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V.3443

No. 21697 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORD M. CONVERSE, APPELLANT,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
APPELLEE,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE APPELLANT

William B. Murray
Attorney for Appellant
525 Failing Building
Portland, Oregon 97204

FILED

MAY 8 1967

WM. B. LUCK, CLERK

MAY 8 1967

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21697

FORD M. CONVERSE, APPELLANT,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

APPELLEE,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE APPELLANT

NATURE OF THE CASE

Ford M. Converse appeals from a summary judgment of the District Court for Oregon affirming a decision of an assistant solicitor for the Secretary of the Interior. The administrative decision made the surface resources of the Edith and Paymaster lode claims¹. subject to the limitations and restrictions of section 4 of the Act of July 23, 1955,². on the ground that the locator had failed to make discovery of a valuable mineral deposit within the purview of the mining laws prior to that date.

1./ Edith and Paymaster lode claims in Secs. 1 and 2, T. 12 S., R. 4 E., W. M., Oregon, recorded in Book 8, pages 214, 215, Official Records, Linn County, Oregon.

2. 30 USC §613 (c) set forth infra. p. 6.

Converse maintains that the administrative decision did not give to the established facts their correct legal significance. It did not apply properly the long-established rule of mineral discovery which the solicitor purported to follow.

Title to mining claims depends upon mineral discovery. This administrative departure from the settled law of discovery does more than diminish the appellant's property rights in the claims he has located; it disturbs the foundation on which title to all located mining claims rests. Therefore, this case is important to the industry upon which our nation depends for metals.

STATEMENT OF PLEADINGS AND JURISDICTIONAL FACTS

Converse filed a complaint seeking judicial review of the administrative proceeding which had been initiated by the Forest Service, United States Department of Agriculture, and heard and determined by the Department of the Interior.

Converse alleged: He is a citizen of Oregon. Stewart L. Udall is the Secretary of the Interior of the United States. R 1. The mining claims are in Oregon. R 2. The amount in controversy exceeds \$10,000. R 2. Converse had exhausted his administrative remedies. R 2. He charged that the Secretary was clearly wrong as a matter of law in listed particulars. R 3.

The Secretary moved for summary judgment based on the administrative file, marked Exhibit 1, attached in support of his motion. This exhibit contained the administrative record, the exhibits and the transcript of the testimony before the Hearing Examiner.

The District Court allowed the Secretary's motion for summary judgment R 29, and affirmed the administrative decision. R 50.

Converse filed a motion for reconsideration. R 51. Briefs were filed, R71, R 84. An order denying the motion was entered. R 89. Notice of appeal, R 93, bond, R 95, designation of record, R 96, and points on appeal, R 98, were duly filed.

We agree with the Secretary's statement that: "The primary dispute in this case is not over the facts but over the legal significance to be given to the established facts." R 24. Our differences are questions of law.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The District Court of the United States had jurisdiction of this action under the Administrative Procedure Act of June 11, 1946, 60 Stat. 243, 5 USC §1009; the Act of June 25, 1948, as amended, 62 Stat. 964, 28 USC §§ 2201, 2202, whereby relief is provided by declaratory judgments; the Act of June 25, 1948, Ch. 646, 62 Stat. 930, 28 USC §1331, as amended, with respect to actions arising out of the Constitution and laws of the United States; the Act of October 5, 1962, 76 Stat. 744, 28 USC §1361, §1391, which authorizes action to compel an officer of the United States to perform his official duty with respect to real property; and the inherent power of the Court to grant injunctive relief in the premises.

JURISDICTION OF THE UNITED STATES COURT OF APPEALS

The jurisdiction of this honorable Court arises under 28 USC §1291.

QUESTIONS PRESENTED

1. Whether an administrative attempt to exercise power over mining claims under the Surface Resources Act is a nullity when there is an administrative failure to comply with mandatory statutes as to the manner and circumstances under which agency power may be exercised.
2. Whether a discovery of a lode in mining claims mineral in character, containing ores of higher average values than similar ores mined in the United States, is a discovery as a matter of law.
3. Whether the existence of a mineral discovery under the mining law depends upon the name given to the kind of further work a reasonably prudent man would be justified in performing on a mineral lode - "exploration" or "development".
4. Whether an administrative agency is required to make requested findings of fact under the Administrative Procedure Act, when those facts are supported by substantial evidence and are uncontroverted.
5. Whether refusal in an administrative proceeding to allow offers of proof for the record on appeal is a denial of a hearing under the Administrative Procedure Act and a denial of "Due Process".
6. Whether a hearing examiner is disqualified under the Administrative Procedure Act from hearing a case when he has signed a notice of hearing asserting the charges at the direction of the prosecuting agency.

STATUTES INVOLVED

Surface Resources Act - 30 USC §613 (a), (c), (e) :

§ 613. Procedure for determining title uncertainties—Notice to mining claimants; request; publication; service

(a) The head of a Federal department or agency which has the responsibility for administering surface resources of any lands belonging to the United States may file as to such lands in the office of the Secretary of the Interior, or in such office as the Secretary of the Interior may designate, a request for publication of notice to mining claimants, for determination of surface rights, which request shall contain a description of the lands covered thereby, showing the section or sections of the public land surveys which embrace the lands covered by such request, or if such lands are unsurveyed, either the section or sections which would probably embrace such lands when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument.

The filing of such request for publication shall be accompanied by an affidavit or affidavits of a person or persons over twenty-one years of age setting forth that the affiant or affiants have examined the lands involved in a reasonable effort to ascertain whether any person or persons were in actual possession of or engaged in the working of such lands or any part thereof, and, if no person or persons were found to be in actual possession of or engaged in the working of said lands or any part thereof on the date of such examination, setting forth such fact, or, if any person or persons were so found to be in actual possession or engaged in such working on the date of such examination, setting forth the name and address of each such person, unless affiant shall have been unable through reasonable inquiry to obtain information as to the name and address of any such person, in which event the affidavit shall set forth fully the nature and results of such inquiry.

The filing of such request for publication shall also be accompanied by the certificate of a title or abstract company, or of a title abstractor, or of an attorney, based upon such company's abstractor's, or attorney's examination of those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in said request, setting forth the name of any person disclosed by said instruments to have an interest in said lands under any unpatented mining claim heretofore located, together with the address of such person if such address is disclosed by such instruments of record. "Tract indexes" as used herein shall mean those indexes, if any, as to surveyed lands identifying instruments as affecting a particular legal subdivision of the public land surveys, and as to unsurveyed lands identifying instruments as affecting a particular probable legal subdivision according to a projected extension of the public land surveys.

Thereupon the Secretary of the Interior, at the expense of the requesting department or agency, shall cause notice to mining claimants to be published in a newspaper having general circulation in the county in which the lands involved are situate.

Such notice shall describe the lands covered by such request, as provided heretofore, and shall notify whomever it may concern that if any person claiming or asserting under, or by virtue of, any unpatented mining claim heretofore located, rights as to such lands or any part thereof, shall fail to file in the office where such request for publication was filed (which office shall be specified in such notice) and within one hundred and fifty days from the date of the first publication of such notice (which date shall be specified in such notice), a verified statement which shall set forth as to such unpatented mining claim

Hearings

(c) If any verified statement shall be filed by a mining claimant as provided in subsection (a) of this section, then the Secretary of Interior shall fix a time and place for a hearing to determine the validity and effectiveness of any right or title to, or interest in or under such mining claim, which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, which place of hearing shall be in the county where the lands in question or parts thereof are located, unless the mining claimant agrees otherwise. Where verified statements are filed asserting rights to an aggregate of more than twenty mining claims, any single hearing shall be limited to a maximum of twenty mining claims unless the parties affected shall otherwise stipulate and as many separate hearings shall be set as shall be necessary to comply with this provision. The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States. If, pursuant to such a hearing the final decision rendered in the matter shall affirm the validity and effectiveness of any mining claimant's so asserted right or interest under the mining claim,

Failure to deliver or mail copy of notice

(e) If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person or as to the rights asserted by that person and the failure of that person to file a verified statement, as provided in such notice, shall in no manner affect, diminish, prejudice or bar any rights of that person. July 23, 1955, c. 375, § 5, 69 Stat. 369, amended June 11, 1960, Pub.L. 86-507, § 1(26), 74 Stat. 201.

Code of Federal Regulations Title 43 Chapter 1 Subpart C Contests and Protests January 1, 1962

SUBPART C—CONTESTS AND PROTESTS¹

PRIVATE CONTESTS AND PROTESTS

§ 221.51 *By whom private contest may be initiated.* Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land or who seeks to acquire a preference right pursuant to the act of May 14, 1880, as amended (43 U. S. C. 185), or the act of March 3, 1891 (43 U. S. C. 329), may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations in this part.

¹In addition to the material under this heading, the general provisions under Subpart D of this part should be consulted.

§ 221.52 *Protests.* Where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances.

§ 221.53 Initiation of contest.

Any person desiring to initiate a private contest must file a complaint in the land office which has jurisdiction over the land involved, or, if there is no such land office, in the Office of the Director, Bureau of Land Management, Washington 25, D.C. The contestant must serve a copy of the complaint on the contestee not later than 30 days after filing the complaint and must file proof of such service, as required by § 221.95, in the office where the complaint was filed within 30 days after service.

§ 221.54 *Contents of complaint.* The complaint shall contain the following information, under oath:

(a) The name and address of each party interested, including the age of each heir of any deceased entryman.

(b) A legal description of the land involved.

(c) A reference, so far as known to the contestant, to any proceedings pending for the acquisition of title to, or an interest in, such land.

(d) A statement in clear and concise language of the facts constituting the grounds of contest.

(e) A statement of the law under which contestant claims or intends to acquire title to, or an interest in, the land and of the facts showing that he is qualified to do so.

(f) A statement that the proceeding is not collusive or speculative but is instituted and will be diligently pursued in good faith.

(g) A request that the contestant be allowed to prove his allegations and that the adverse interest be invalidated.

(h) The office in which the complaint is filed and the address to which papers shall be sent for service on the contestant.

(i) A notice that unless the contestee files an answer to the complaint in such office within 30 days after service of the notice, the allegations of the complaint will be taken as confessed.

CODIFICATION: In § 221.54, the last sentence reading as follows: "If the complaint does not meet each of these requirements, it will be summarily dismissed." was deleted by Circular 1962, 21 F. R. 7622, Oct. 4, 1956.

§ 221.58 *Service.* (a) The complaint must be served upon every contestee. If the contestee is of record in the land office, service may be made and proved as provided in § 221.95. If the person to be served is not of record in the land office, proof of service may be shown by a written statement of the person who made personal service, by post-office return receipt showing personal delivery, or by an acknowledgment of service. In certain circumstances, service may be made by publication as provided in § 221.60.

§ 221.64 *Answer to complaint.* Within 30 days after service of the complaint or after the last publication of the notice, the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint, together with proof of service of a copy of the answer upon a contestant as provided in § 221.95. The answer shall contain or be accompanied by the address to which all notices or other papers shall be sent for service upon contestee.

§ 221.65 *Action by Manager.* (a) If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing.

§ 221.68 *Proceedings in Government contests.* The proceedings in Government contests shall be governed by the rules relating to proceedings in private contests

Administrative Procedure Act 5 USCA §1005 (b)

Issuance of process; investigations; transcript of evidence..

(b) No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

Administrative Procedure Act 5 USCA §1004 (c) :

Authority and functions of officers and employees

(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

STATEMENT OF FACTS

Government's Case in Chief

Lodes Discovered: Contestant called three witnesses to establish its case in chief.¹ Contestant's map, Exhibit C, shows the Converse lode on the Edith and Paymaster claims, and their proximity to the Riverside (Kroeplin) claims to the Northwest, and to the Risley claims to the North. R 152. All of these claims lie along the same major fracture in the earth's crust, Tr 75. This major structure extends approximately four miles from the Converse claims

<u>1./ WITNESS</u> <u>Contestant's</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Ford M. Converse	8	16	27	30
Milvoy M. Suchy	34	53		

This map has been enlarged from
Exhibit C R 152

Exhibit No. *C* Docket No. *01195-D*
 H. M. *U.S. v. Converse*
 Offered by *Sucky* Date *6-11-67*
 Reporter *Montgomery*

U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE
**WILLAMETTE
NATIONAL FOREST**
OREGON
 1960

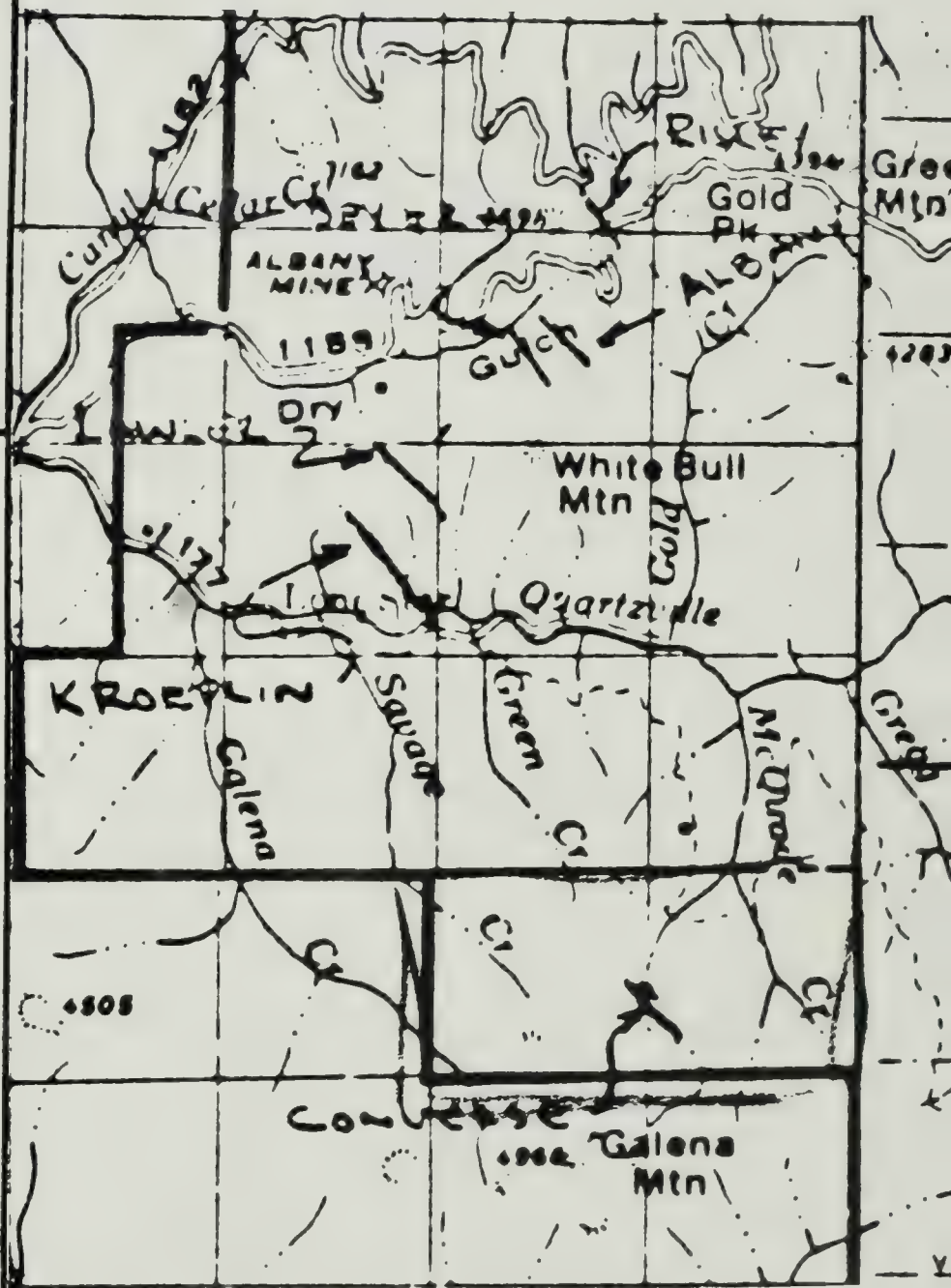
CASCADIA RANGER DISTRICT

Scale
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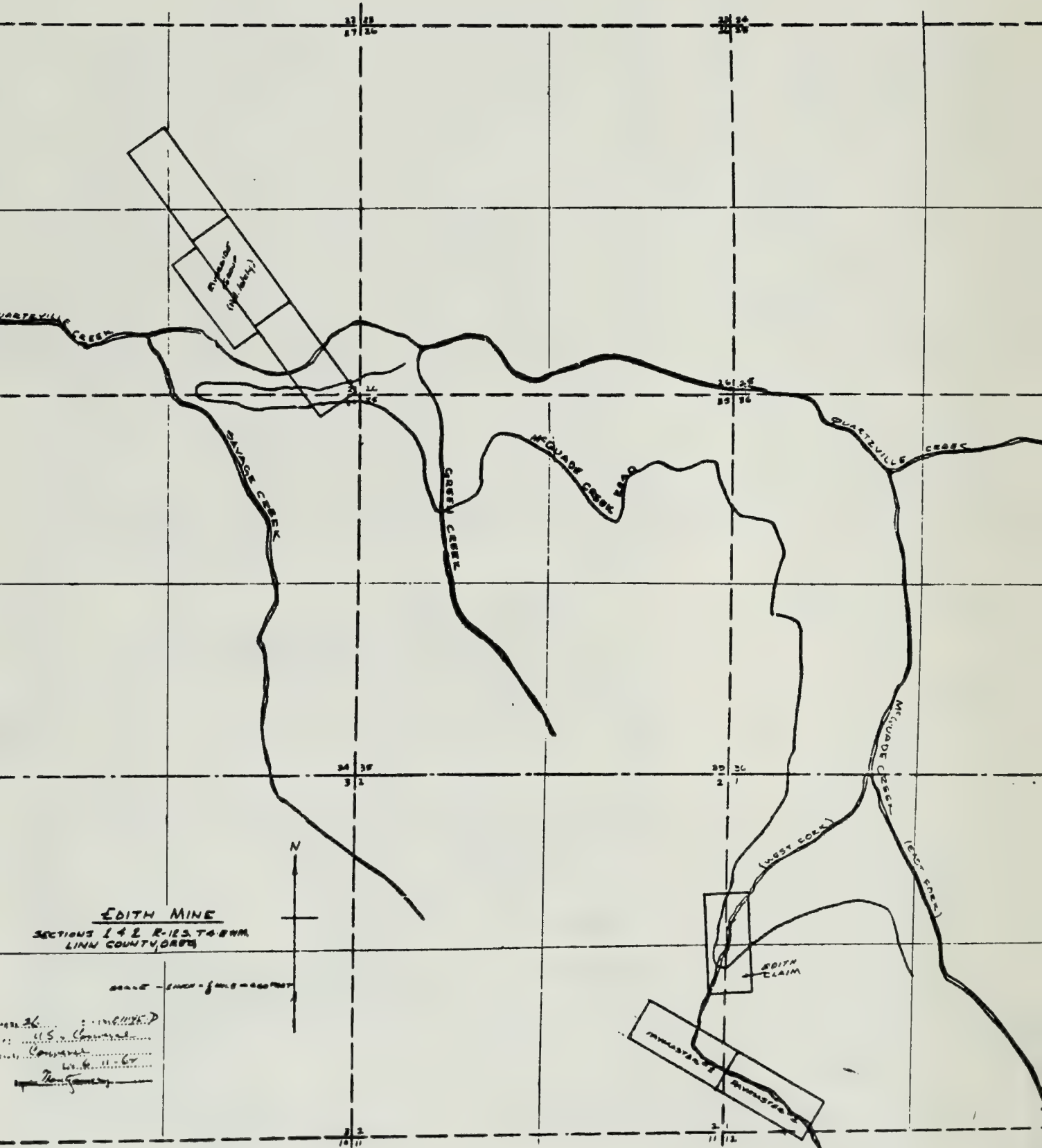
LEGEND

Supervisor's Headquarters } Report
 District Ranger Station } Fires
 Guard Station } Here
 Triangulation Station
 Permanent Lookout Station
 Triangulation Station and
 Permanent Lookout Station
 Emergency Lookout
 House Cabin or Other Building
 Mine or Quarry
 Airway Light Beacon
 Gaging Station
 Located or Landmark Object
 Improved Recreation Area, Fox Ser
 National Forest Boundary
 Adjacent National Forest Boundary
 Transmission Line
 Railroad
 Trail
 Road, Dirt or Better
 Road, Primitive
 Forest Development Roads
 U. S. Highway
 State Highway
 National Forest Land

*5 miles
to
15 mile*



T-4-BNM

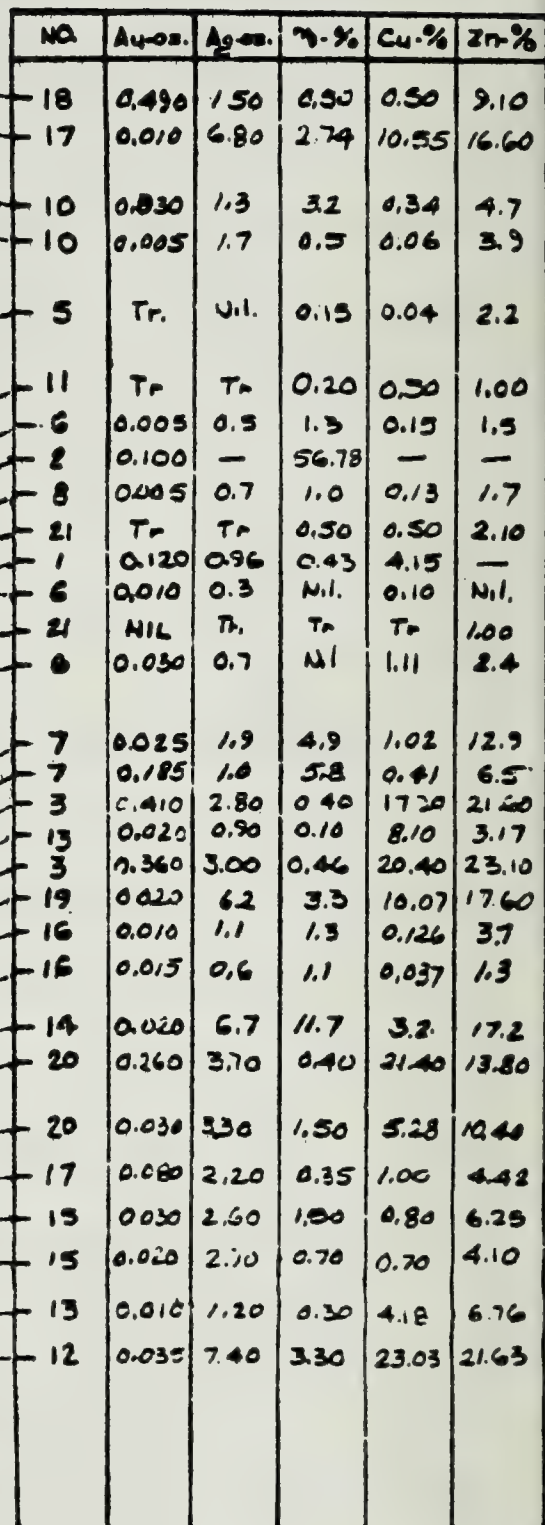


to the Risley claims to the North. See scale on Exhibit C, R 152, before enlargement. The fracturing is over a wide area Tr 74.

The fracturing of the earth's crust makes an underground plumbing system for the mineral solutions to come up from below and form veins. Tr 74. The lodes are fractured fillings of massive and vuggy quartz in which there are sulphides of base metals. Tr 40. One zone of base metal sulphides is on the Edith and Paymaster mine, another on the Riverside claims, and a third on the Risley group. Tr 75, 76. Gold, Silver, Copper, Lead and Zinc minerals were discovered.

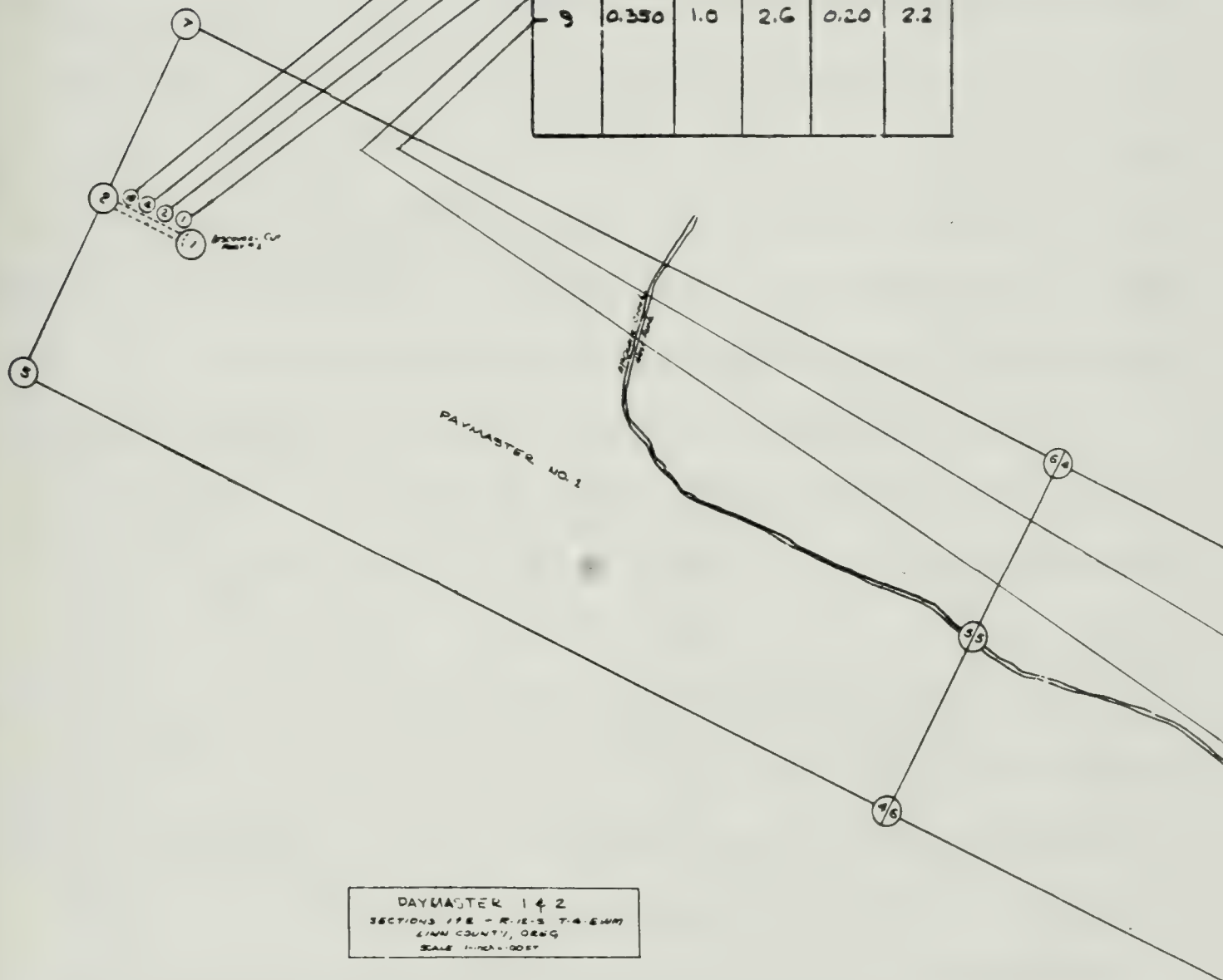
Valuable Minerals Discovered: The Examiner found that six samples taken by the mining claimant from or near the discovery cut in the North half of the Edith claim were taken from the mineral parts of the vein at the places indicated on Exhibit 28, and average \$36.42 per ton. Tr 23, Ex. 28, Finding No. 7, see page 20, this Brief. And this finding, affirmed by the Secretary, shows average values approximately three times the average values of similar ores mined in this United States. Tr 117, 118.

The Examiner found that four samples taken by the mining claimant and one taken by the Government in the adit on the Paymaster claim averaged \$74.20 per ton, Ex. 27, Finding No. 14, see page 23, this Brief. And this finding, affirmed by the Secretary, shows average values approximately five times the average values of similar ores mined in the United States. Tr 117, 118.



Exp. No. 28 Date 11-11-62
 Name: U.S. v. Gonzalez
 Title: Counselor
 Date: 6-11-62
 Signature: [Signature]

NO.	Au-oz.	Ag-oz.	Pb-%	Cu-%	Zn-%
18	0.49	1.30	0.30	0.30	9.10
4	0.16	3.00	0.40	16.60	12.30
2	0.070	2.9	25.9	—	—
1	—	—	61.2	0.35	—
9	0.040	1.2	2.1	0.25	2.4
9	0.350	1.0	2.6	0.20	2.2



1-12-22
15-12-22
15-12-22
15-12-22
15-12-22
15-12-22

Other samples were taken but were not included in the averages computed above since they were exceptionally high in grade. These include exhibits 33 and 34 and a 50 pound sample sent to the Selby smelter.

It was stipulated as to exhibit 33: Mr. Smith took the sample 50 feet from the road cut along the lode line in the southern part of the Edith claim. It weighed 15 pounds. It contains sulphide and 7% to 10% lead and 10% to 15% zinc. Tr 184-187.

It was stipulated as to exhibit 34: Mr. Converse took the sample in the tunnel on the Paymaster claim. It weighed three pounds. It contained 60% lead and 20% zinc. It assayed \$192 per ton. Tr 201, 202, 221, 222.

A large sample of 50 pounds was shipped to the Selby smelter, Tr 78. It was a sample taken from the Edith claim, Ex. 14, Ex. 28. The smelter's assay showed gold 0.02 oz., silver 6.7 oz., lead 11.7%, copper 3.2%. Ex. 14, Tr 78.

The Minerals Officer and mining engineer for the Government, Mr. Suchy, took additional samples. When asked to produce the assay certificates, he said the attorney for Forestry had them. The attorney refused to produce the assays on the ground that they were his work record. Tr 62.

Contestant's exhibits A-J were received in evidence in the Government's case in chief. Mining claimant's exhibits, assay certificates 1-21 and map showing the relation of the Edith and Paymaster claims to the Riverside group, exhibit 26, and map of the Edith claim showing assays, exhibit 28, and map of the Paymaster claim showing assays, exhibit 27, and map showing principal mineral deposits in

the State of Oregon, exhibit 29, and exhibits 22, 23, 24 showing professional backgrounds of mining claimant's geologists and the report of Dr. W. G. Johnson, exhibit 25, were all received during the Government's case in chief.

EXHIBITSFOR IDENTIFICATIONADMITTEDContestant's :

A Map of Edith Lode Claim	10	30
B Timber values in both claims	33	33
C Map of general area (Cascadia Ranger District Map)	36	37
D Map showing Edith & Paymaster claims	37	52
E Map of workings	38	52
F Photograph showing workings	42	52
G Assay certificate, August 1960	43	52
H Assay certificate, May 1962	45	52
I Assay certificate, October 1960	52	52
J Mr. Holmgren's sketch map of Paymaster tunnel	106	116

Mining Claimant's :

1-21 Assay certificates	7	8
22 Professional background, Dr. W. G. Johnston	7	8
23 Professional background, Dr. Albert J. Walcott	7	8
24 Professional background, Russell A. Paige	7	8
25 Report, Dr. W. G. Johnston	7	8
26 " " " " (signed copy)	17	93
27 Map, Paymaster	17	30
28 Map, Edith claim	19	30
29 State of Oregon map showing principal mineral deposits	102	103
30 Three rocks	129	Rejected 132
31 Rock sample	157	160
32 Rock sample	168	-
33 Sample from Edith lode line	184	186
34 Sample from Paymaster lode	201	222

National Average for Ores Mined: The average value of lead and zinc ores mined in the United States is \$12 to \$14 per ton, Tr 117. The average for copper ores mined in the United States is \$6 per ton, Tr 118.

Exploration and Development Overlap: The mineral officer and mining engineer for the Government, Mr. Suchy, explained that it was quite obvious

that exploration work and development work overlap and describe the same kind of work. Driving a shaft in country rock may be either exploration or development work, Tr 89. A crosscut, whether in ore or not, may be described as development or as exploration work, Tr 90. Diamond drilling, tr 89, drifting, Tr 89, bulldozing, Tr 85, may be either development or exploratory work.

Further Work Justified: Mr. Suchy testified that if the claims were his, he would, as a prudent man, spend money on the claims. He would do bulldozing and then some drifting on the vein. If the trenching was in ore, it would be development work. It would be justifiable to spend more money on the property in an effort to determine the extent of the ore body. He advised Mr. Converse to spend his money and time on the claims. Tr 100, 101.

Mining Claimant's Witnesses: ^{1.}

Dr. William G. Johnston, geologist, M.I.T., wrote a report on the mine which shows that a reasonably prudent man would be justified in spending effort and money on the claims to make a mine. Exhibit 25,

Dr. Albert J. Walcott, geologist, testified that there was sufficient mineralized showing on the Edith claim to justify a reasonably prudent person

1./ <u>Contestee's Witnesses:</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Carl N. McInnis	122	133		
Floyd Persons	138	160		
Edward A. Leonard	162	172		
Albert J. Walcott	173	175		
Russell A. Paige	177	179	180	
Richard A. Smith	182	188	189	
Damon L. Leonard	191			
Ford M. Converse	200	209	212, 219	216

in spending time and money in an effort to develop a paying mine. Tr 174.

Russell A. Paige, M.Sc. in geology, formerly with the United States Geologic Survey, who has published a number of technical publications, testified that he would recommend spending time and money on the Edith claim, and that a reasonably prudent person would be justified in doing so. Tr 178, 179.

Edward A. Leonard, geologist and mining man, gave his opinion that there was sufficient mineral on the Edith and the Paymaster claims to warrant a reasonably prudent man in spending time and money to develop a paying mine, and that he would recommend doing so. Tr 171.

Carl N. McInnis, U. S. Department of Agriculture employee, testified that he was experienced in mining and gave his opinion that a reasonably prudent man would be justified in spending time and money to develop the Edith and Paymaster claims. Tr 133.

Richard A. Smith, a prospector with over 30 years experience, testified that a prudent man should sure spend more money in that kind of a locality to develop a mine. Tr 188.

Contestant's Rebuttal:

Mr. Suchy testified that smelter charges would probably run between 25 and 25% of the metal price value; lead will run somewhat higher, around 50% to maybe 60% in some cases, of the metal price value. Tr 222.

REQUESTED FINDINGS

The Hearing Examiner adopted certain findings of fact requested and denied others. The Secretary adopted the findings as made by the Examiner.

The requested findings and rulings thereon are as follows :

Requested Finding No. 1. The Edith and Paymaster claims were located originally by the father of Mr. Converse over fifty years ago. In 1910, the only access to the claims was by a trail which led thirty miles to the nearest road. (Tr. 16). Mr. Converse relocated the claims in 1951 (Tr 15). Access roads were built into the area in the Fifties (Tr 17). Ruling on No. 1: The first two sentences are adopted. The third sentence is amended to read: "Access roads were built into the area in 1959 and 1960."

Requested Finding No. 2. When the area in which the claims are situated was surveyed, it was determined by the Land Office of the United States that sections 1 and 2 in the area were mineral lands, and they were so classified. (Tr 208). Ruling on No. 2: Is amended to read: The land on which the claims are located is mineral in character.

Requested Finding No. 3. Three sulfide zones (found by Mr. Suchy) are one on the Edith and Paymaster claims, another on the Riverside claims,¹ and a third on the Risley group, which are on the same major structure. The sulfide zones have never been investigated to any extent, and it is yet to be determined whether they are productive in large quantities or in small quantities of commercial ore. The fact that these sulfide zones do exist is one of the favorable criteria for the development of these properties. (Tr 75, 76, testimony of Mr. Suchy. Ex 26). Ruling on No. 3: The first sentence except for the

¹/ Riverside Claims were clearlisted for patent by Mr. Suchy (Tr. 75).

last clause "which are on the same major structure" is adopted. There was no evidence to support this claim. The second and third sentences are adopted.

Requested Finding No. 4. The vein on the Edith Claim is such that an experienced prospector could follow it the length of the claim and determine that there was a lode of mineral-bearing rock along the lode line by observing the oxidization on the surface and digging into the rock in place (Tr 184), and by using an electronic instrument to measure the absence of radioactivity. Lead is not as radioactive as the country rock (Tr 189, 190). Ruling on No 4: The first sentence is denied. The great weight of the evidence was that the veins on the Edith had a strike of approximately N. 45° W and could not be along the lode line. The second sentence is adopted.

Requested Finding No. 5. Prior to July 23, 1955, in 1950, a cut, required by Oregon law, was dug near a hemlock tree near the middle of the Edith claim near post No. 1 (Tr 11). Samples were taken with an axe from a lode or ledge of mineralized rock exposed in the cut from the rock face (Tr 25). When assayed on September 10, 1950, the samples ran 61.2 per cent lead and .35 per cent copper, showing a value of \$30.86 per ton. (Exhibits 1 and 28). Ruling on No. 5: The first sentence is adopted. The second sentence is denied. It is not supported by consistent testimony. The third sentence is inaccurately stated. There are two samples shown on the assay certificate (Exhibit 1) dated September 10, 1950. The first had 61.2% lead and .35% copper. The per ton value of this sample at the prices of lead and copper given at the hearing is in excess of \$150. The second sample contains .12 oz. gold,

.96 oz. silver, .43% lead and 4.15% copper. The value shown on the certificate for the second sample is \$31.86. Whether these samples came from boulder the face of a cliff or the discovery pit is not clear from the testimony.

Requested Finding No. 6. That the cut near the middle of the Edith claim is marked No. 1 on Exhibit 28, and red circles on this map represent ore samples taken from the Edith claim. Numbers in the red circles and in the table of assays correspond to the assay certificates numbered as Exhibits 1 through 21 (Tr 18).
Ruling on No. 6: is adopted. Many of the assay certificates contain more than one sample and the exhibit number on the plat does not distinguish between samples.

Requested Finding No. 7. The samples taken from, or near, the cut near the center of the Edith claim were chip samples from the mineral parts of the veins and were taken by the Mining Claimant, or at his direction, at the places indicated by red circles on Exhibit 28. (Tr 23). They assayed as follows:

<u>Sample No.</u>	<u>Au. oz.</u>	<u>Ag. oz.</u>	<u>Pb. %</u>	<u>Zn %</u>	<u>Cu %</u>	<u>Value per ton</u>
1.	0.12	0.96	0.43	nil	4.15	\$ 30.86
2.	0.10	nil	56.78	nil	nil	115.50
6.	0.005	0.5	1.3	1.5	0.15	7.64
6.	0.03	0.7	nil	2.4	1.11	13.12
8.	0.005	0.7	1.0	1.7	0.13	8.30
21.	Tr	Tr	0.50	2.10	0.50	8.60

Ruling on No. 7: Is adopted with the following exception: The samples were both chip and grab samples and the 4th sample labeled 6 was from a site west

of the road not near the discovery cut. A computation of value for the 2nd
cents
sample with lead at 12.36/a pound will result in a value of over \$150 per ton.

Requested Finding No. 8. The cut described above was covered over by the debris left by the Forest Service in building an access road through the Edith claim. When Mr. Suchy was there, the talus of this debris had sloughed into the cut (Tr 204). Although the Claimant had cleaned out the cut three or four times Tr 210, the debris put into the cut by the Forest Service filled it up again and made an inspection of the cut dangerous. (Tr 205, 210).

Ruling on No. 8: Is adopted.

Requested Finding No. 9. Prior to July 23, 1955, in 1951, an outcrop was discovered in the southerly part of the Edith claim. Work was done on the outcrop before the access road was constructed, and fresh rock at this point exposed the same vein also seen in the cut to the north near the middle of the claim. (Tr 192-194). Ore occurred in parallel veins; the largest was 28" in width. (Tr 196). Ruling on No. 9: Is denied. This finding is not supported by the evidence.

Requested Finding No. 10. Samples taken by Milroy Suchy, Contestant's engineer, from the fracture zone structure on the Edith claim exposed in the area of the outcrop mentioned above, south of the McQuade Creek, were assayed as follows: (Tr 53-56, Exhibit G)

<u>Tr p.</u>	<u>Sample No.</u>	<u>Au.oz.</u>	<u>Ag. oz.</u>	<u>Pb.%</u>	<u>Zn.%</u>	<u>Cu.%</u>	<u>Value per ton</u>
53, Ex G	FC 2	0.01	2.8	8	16	1.55	\$ 64.97
55 Ex G	FC 3	nil	nil	0.3	2.8	0.25	8.32
55 Ex G	FC 4	nil	0.6	2.4	3.2	0.15	13.76
54 Ex G	FC 5	0.01	1.6	4.	10.4	0.65	37.37

Ruling on No. 10: Is denied. This finding is not material to the issue.

Requested Finding No. 11. Samples in the same area mentioned in requested findings 9 and 10 above were taken by the Mining Claimant, or at his direction, and were assayed with the following results: Exhibit 28

<u>Sample No.</u>	<u>Au.oz.</u>	<u>Ag.oz.</u>	<u>Cu.%</u>	<u>Zn.%</u>	<u>Pb.%</u>	<u>Value per ton</u>
3	0.36	3.00	0.46	23.10	20.40	\$ 122.68
3	0.41	2.8	0.4	21.60	17.29	112.64
7	0.025	1.9	4.9	12.9	1.02	44.87
7	0.185	1.0	5.8	6.5	0.41	37.90
12	0.035	7.40	3.30	21.63	23.03	139.15
13	0.010	1.20	0.30	6.67	4.18	44.69
13	0.020	0.90	0.10	8.10	3.17	56.86
14	0.020	6.7	1.17	17.2	3.2	89.77
15	0.030	2.6	1.50	0.8	6.25	24.65
15	0.020	2.1	0.7	4.1	0.7	18.10
16	0.010	1.1	1.3	3.7	0.126	10.90
16	0.015	0.6	1.1	1.3	0.037	10.02
17	0.080	2.20	0.35	4.42	1.00	20.60
19	0.020	6.2	3.3	17.60	10.07	97.70
20	0.260	3.70	0.40	13.80	21.40	167.98
20	0.030	3.70	1.50	10.40	5.28	61.43

Ruling on No. 11: Is denied. This finding is not material to the issue.

Requested Finding No. 12. Mr. Smith, a prospector, took a 15 lb.

piece of rock (Ex. 33) 40 feet above the place where the road crosses the Edith claim. The rock was exposed as an outcrop and was not exposed by road work. Tr 186. It was stipulated that the rock, Ex. 33, weighs about 15 pounds and is about 20% sulfides consisting of 7 to 10% lead and from 10 to 15% zinc.

Ruling on No. 12: Is adopted.

Requested finding No. 13. That on the Edith claim there is a vein or lode of quartz or rock in place. The quartz or other rock in place carries gold, silver, copper, lead and zinc. That the occurrence is such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.² Ruling on No. 13: Is denied for the reasons set forth in the decision.

PAYMASTER CLAIM

Requested Finding No. 14. Sample No. FC-10 was taken in the adit on the Paymaster claim by Mr. Holmgren (Tr 108, Exhibit J). Samples Nos. 1, 2, 4 and 18 were taken by the Mining Claimant, or under his direction, in the same adit, as is shown by Exhibit 27. Numbers circled in red on the map, Exhibit 27, show the places where the samples were taken. The samples were assayed with results as follows:

2./ See testimony of: Suchy, Tr 84-90, Forest Service mining engineer; McInnis, U.S. Department of Agriculture employee, Tr 133; Edward A. Leonard, geologist, Tr 171; Dr. Walcott, geologist, Tr 174; Russell A. Paige, geologist, Tr 178; Richard A. Smith, prospector Tr 188; Dr. W. G. Johnston, geologist Ex 25.

<u>Tr p.</u>	<u>Exhibit</u>	<u>Sample No.</u>	<u>Au.oz.</u>	<u>Ag. oz.</u>	<u>Pb%</u>	<u>Zn%</u>	<u>Cu%</u>	<u>Value per ton</u>
108	EXJ	FC-10	0.38	1.3	2.6	5.0	0.20	\$ 29.57
	EX 27	1	nil	nil	61.2	nil	0.35	167.88
	Ex 27	2	0.07	2.9	25.9	nil	nil	61.72
140	Ex 27	4	0.16	3.00	0.40	12.50	16.60	71.51
	Ex 27	18	0.49	1.50	0.50	9.10	0.50	40.35

Ruling on No. 14: Is adopted subject to correction of sample No. 4. In this sample the percentages of copper and lead have been inverted.

Requested Finding No. 15. About 50 years ago, Mr. Converse took from the Paymaster adit, Exhibit 34, and based upon stipulation it was agreed that this sample weighs approximately three pounds and contains 60% lead and 20% zinc. (Tr 221, 222). Ruling on No. 15: Is adopted.

Requested Finding No. 16. Prior to July 23, 1955, in 1950, Mr. Converse made a discovery on the Paymaster claim near the portal of the adit and Post No. 1. A sample marked 1 in a red circle on Exhibit 27 was assayed September 10, 1950, and shows lead and copper of the value of \$28.80 per ton (Exhibits 1 and 27). Ruling on No. 16: Is denied for the reasons set forth in the decision.

Requested Finding No. 17. On the Paymaster claim there is a vein or lode of quartz or rock in place which carries gold, silver, copper, lead and zinc. The occurrence is such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.³.

³/ See testimony of Carl McInnis, Tr. 133; Ed Leonard, geologist, Tr 171, 172; Richard Smith, miner, Tr 187, 188.

Ruling on No. 17: Is denied for the reasons set forth in the decision.

SPECIFICATIONS OF ERROR

We will prove our case by showing that the District Court erred as a matter of law in allowing the Secretary's motion for summary judgment and affirming the administrative decision.

1) Since the Surface Resources Act makes mandatory, under §613 (c) that a complaint be filed stating the facts constituting the grounds of contest, the court below erred in holding that no complaint was necessary. R 44.

2) Since the court below found that a copy of the published notice had not been served on the mining claimant, R 43, as required by §613 (a), the court erred by failing to hold that the publication was a nullity under §613 (e) and to reverse the Secretary for his failure to exercise administrative power in accordance with the statute upon which that power depends.

3) Since the court below found that no certificate of title accompanied the statutory request initiating the proceeding under §613 (a), R 43, it erred in failing to hold the proceeding a nullity and to reverse the Secretary for noncompliance with the statute upon which his power depends.

4) Since the undisputed facts show the discovery of lodes in claims mineral in character containing ores of higher values than similar ores mined in the United States, it was error for the District Court to hold that the evidence failed to establish a mineral discovery under the mining law.

5) Since the Secretary upheld the Examiner's denial of mining claimant's right to make offers of proof for the record on appeal, the court below erred in upholding the decision of the Secretary.

6) Since the mining claimant's requested findings 9, 10, 11, 13, 16 and 17 were material to the issues and were supported by substantial evidence undenied, the court below erred in failing to correct the administrative decision as to each such requested finding.

7) Since it appears from the Notice of Hearing of February 14, 1962, that the charge of want of discovery was asserted by the Hearing Examiner over his signature at the direction of Forestry, the prosecuting agency, the court below erred by failing to hold that mining claimant's motion for change of hearing examiner should have been allowed under the Administrative Procedure Act, 5 USC §1004 (c).

SUMMARY OF THE ARGUMENT

The District Court erred as a matter of law in allowing the Secretary's motion for summary judgment and affirming the administrative decision.

The first three specifications of error concern the exercise of agency power where the agency has failed to comply with the conditions of the statute which created that power. We are concerned with agency non-compliance with the conditions upon which agency jurisdiction over the subject matter is made to depend. The Court below concluded that agency non-compliance with statutory conditions was not necessary. It found that no complaint had been filed, no service of published notice had been made, and that no certificate of title accompanied the statutory request initiating the proceedings.

The fourth specification concerns the application of the law of

mineral discovery to the established facts. The fifth concerns administrative refusal to allow offers of proof to be made for the record on appeal. The sixth specification concerns refusal to find facts material to the issue which were supported by uncontroverted evidence. The seventh asserts that the mining claimant's motion for change of hearing examiner should have been allowed.

1. The court below found that no complaint was filed and concluded that none was necessary. The Surface Resources Act, 30 USC 612, amends the mining law. It makes mining claims subject to the rights of the government, its permittees and agencies to use the surface of mining claims, and §613 (a), sets out in detail, the procedure designed to make §612 retroactive in its application to mining claims located prior to July 23, 1955 effective date of the Act.

§613 (a) grants power to Forestry to initiate a proceeding to determine title to mining claims. §613 (c) grants power to Interior to hear and decide such controversies and requires that Interior shall follow its established practice with regard to contests or protests. The established practice requires the filing of a complaint setting forth a statement in clear and concise language of the facts constituting the grounds of contest. 43 C.F.R. 221.54.

The notice published under §613 (a) is not a complaint because it does not state facts constituting the grounds of contest. It requires the mining claimant to state the date, book and page where recorded, legal

description of his claim, and whether he is a locator or a purchaser. R 241.

The Administrative Procedure Act makes mandatory that no process shall be enforced in any manner except as authorized by law. 5 USCA 1005 (b), 1008 (a). Agency power must be invoked in the manner provided by statute. Unless agency power is exercised strictly according to the procedures fixed by the statute granting the power, the action is a nullity.

2. The court below found that a copy of the published notice had not been served on the mining claimant as required by §613 (a). The court erred by failing to hold that such publication was a nullity under §613 (e), which provides that failure to serve a copy of the publication renders the proceeding wholly ineffectual. Such failure was agency non-compliance with a mandatory statute.

3. The court below found that no certificate of title accompanied the statutory request initiating the proceeding under §613 (a). The court erred by failing to hold that the proceeding was a nullity and to reverse the Secretary for non-compliance with the statute upon which his power depends.

A certificate that there are "no tract indexes", R 238, is no substitute for a "certificate of title" prescribed by §613 (a).

It is impossible to reconcile the certificate of Mr. Clark that there are no tract indexes with the affidavit of Ralph L. Warstell, R 240, that he mailed a notice to each of the mining claimants whose name and address

is set forth in the certificate of examination of tract indexes relating to lands described in the published notice.

The legislative history shows that Congress intended to set up technical procedural safeguards to protect bona fide mining claimants against harrassment by administrative agencies. U.S. Code, Cong. and Adm. News, 84th Congress 1st Session, 1955, Vol. 2, p. 2479.

4. The undisputed facts show the discovery of lodes, in claims mineral in character, containing ores of higher value than similar ores mined in the nation. Applying the proper legal standard of discovery under the mining law to the established facts, the administrative decision should have been reversed.

a. Lodes were discovered containing massive sulphides of base metals on claims in a sulphide zone.

b. The Government's witnesses established that:

- i. The average value of the ores discovered in the lodes on the claims exceeds the average value of the same ores mined in the United States.
- ii. The average value of lead and zinc ores mined in the United States is \$12 to \$14 per ton (Tr 117), and the average for copper ores mined in the United States is \$6 per ton (Tr 118).
- iii. The Government's samples of the lode on the Edith claim average \$31.10 per ton. (Exhibit 28) R 20
- iv. The Mining Claimant's 22 samples of the lode on the Edith claim average \$56.64 per ton. (Exhibit 28) R 20
- v. The Governments sample of the ore in the lode on the Paymaster claim was \$29.50 per ton. (Exhibit 27) R 20

- vi. The Mining Claimant's samples of the ore in the lode on the Paymaster claim averaged \$122.25 per ton. (Exhibit 27) R 20
- vii. Mr. Suchy, Mining Engineer for the Government, advised Mr. Converse to spend time and money doing further bulldozing and drifting on the vein. Mr. Converse' reliance on his advice is justified.
- viii. Mr. Suchy, as a prudent man, said if the claims were his, he would do bulldozing and drifting on the vein. It would be justifiable to spend more money on the property in an effort to determine the extent of the ore body. Tr 100, 101.

c. Exploration and development work mean the same thing insofar as they relate to the effort to make a mine out of a particular ore deposit that has been discovered. Discovery does not depend upon the name given to the kind of work a prudent man would be justified in performing on a mining claim. Charlton v. Kelly, 156 F 433, 436 (9th Cir. 1907).

d. The rule for evaluating mineral discovery is the "prudent man rule" from Castle v. Womble, 19 L.D. 455. A mining claimant is not required to show that he has encountered a deposit which would be commercially profitable immediately. A valuable mine need not be a profitable one so long as the mineral encountered is of prospective value. We are concerned here with a major structure, a lode of major proportions and not with stringers, pods, veinlets or lenses. The court below erred in failing to correct the wrong conclusion that the administrative decision drew from the undisputed evidence relating to discovery.

5. The court below erred by upholding the administrative denial of mining claimant's right to make offers of proof for the record on appeal.

Denial of the right to state into the record for the scrutiny of the appellate court what evidence a party would expect to prove by the excluded testimony is tantamount to denial of a trial and is a denial of "Due Process".

6. The mining claimant's requested findings nos. 9, 10, 11, 13, 16 and 17 were material to the issues and were supported by substantial evidence undenied. The court below erred in failing to correct the administrative decision as to each such requested finding.

Findings 10 and 11 related to samples taken on the south half of the Edith claim, which were erroneously rejected and not considered. Since the lode had been discovered prior to the effective date of the Surface Resources Act, the Government's samples and the mining claimant's samples of the same lode in the south half of the claim should have been considered as evidence establishing the value of the minerals in the discovered lode. These samples taken after 1955 did not evidence a new discovery and should not have been rejected on that pretext.

Evidence offered by the Government in its case in chief established the facts which should have been found as requested in each of the requested findings.

7. The charge of want of discovery was asserted by the Hearing Examiner over his signature at the direction of Forestry, the prosecuting agency. The court below erred by failing to hold that the mining claimant's motion for change of hearing examiner should have been allowed under the

Administrative Procedure Act. A hearing examiner is disqualified from hearing a case if he acts at the direction of an agency engaged in the performance of investigating or prosecuting functions. Forestry was so engaged and the examiner acted at the direction of the agency. 5 USC 1004 (c).

ARGUMENT

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN ALLOWING THE SECRETARY'S MOTION FOR SUMMARY JUDGMENT AND AFFIRMING THE ADMINISTRATIVE DECISION.

The Surface Resources Act, Public Law 167, was enacted July 23, 1955, 69 Stat. 368, 30 USC 612, 613, (Supp. 1965).

Section 612 makes unpatented mining claims located after July 23, 1955 subject to the Government's right to manage surface resources and to manage and dispose of vegetative resources, except mineral deposits subject to location under the mineral laws of the United States. And, it makes the claims subject to the right of the United States, its permittees and agencies, to use so much of the surface thereof for such purposes or for access to adjacent lands.

Section 613 (a) sets out a detailed procedure designed to make §612 retroactive in its application to mining claims located prior to July 23, 1955, as to claims alleged to be invalid. The head of any agency responsible for administering lands of the United States may initiate a proceeding for determination of the surface rights of lands he is charged with administering.

§613 (c) provides that after the prosecuting agency has complied with the provisions of section (a), the Secretary of the Interior shall have power to hear the case and make a determination of the facts in accordance with the procedures then established by the Department of the Interior in respect to contests or protests affecting public lands of the United States.

There is no presumption of lawful exercise of authority enjoyed by administrative agencies. Jurisdiction of the subject matter by administrative agencies must be pleaded and proved, Phillips v. Fidalgo Island Packing Co., 230 F 2d 638, 16 Alaska 12, Rehearing denied 238 F 2d 234, 16 Alaska 338, Cert. den. 77 S Ct. 262, 352 U.S. 944, 1 L ed 2d 237, 16 Alaska 561.

The powers of inferior courts and administrative agencies created by Congress are confined to those bestowed by Congress. Marquette Cement Mfg. Co. v. Federal Trade Commission, 147 F 2d 589, (CCA 7 1945.) Expertise possessed by an administrative agency does not empower the agency to rewrite the laws which it has been charged with enforcing. Atlanta Trading Corp. v. Federal Trade Commission, 258 F 2d 365 (CA 2 1958). And Administrative powers cannot be created by the courts in the proper exercise of their judicial functions. Federal Trade Commission v. Raladam Co., 283 U.S. 643, 51 S. Ct. 587.

We are concerned here with the exercise of agency power in accordance with the conditions of the statutes which created that power. We are not concerned with jurisdiction over the person but with agency non-compliance with the conditions upon agency jurisdiction over the subject matter

is made to depend.

I

SINCE THE SURFACE RESOURCES ACT MAKES MANDATORY, UNDER §613(c) THAT A COMPLAINT BE FILED STATING THE FACTS CONSTITUTING THE GROUNDS OF CONTEST, THE COURT BELOW ERRED IN HOLDING THAT NO COMPLAINT WAS NECESSARY.

The power of the Secretary of the Interior to hear cases and determine them under §613 (c) is made to depend upon the Secretary's compliance with the provisions of the statute which creates that power. Section 613 (c) requires that: "The procedures with respect to notice of such a hearing and the conduct thereof...shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States".

The legislative history makes clear that the Department of the Interior is required to follow established procedures with respect to contests or protests affecting public lands. Report No. 730 of the House Committee on Interior and Insular Affairs, emphasizes this point as follows:

"Such hearing would, under the bill, follow the established procedures and rules of practice of the Department of the Interior with respect to contests or protests affecting public lands."
U.S. Code, Cong. and Admin. News, 84th Congress, 1st Session 1955, Vol. 2, p. 2485. (Emphasis supplied)

The established rules of the Department of the Interior require that an initiation of a contest must be by complaint. (Part 221) 43 CFR 221.63. The Complaint shall contain "a statement in clear and concise language of the facts constituting the grounds of contest". 43 CFR 221.54. By the

use of the word "shall", the act makes mandatory that the then established rules of procedure of the Department as to contest proceedings be followed in cases brought under the act.

Section 221.63 - Initiation of Contest. This regulation requires that initiation of a contest must be by a complaint, which must be filed in the Land Office, or if none, in the office of the Director, Bureau of Land Management, Washington, D. C.

Section 221.54 - Contents of Complaint. This regulation requires that the complaint shall contain certain information and shall be under oath. It requires "a statement in clear and concise language of the facts constituting the grounds of contest". (emphasis supplied)

Section 221.68 - Proceedings in Government Contests. This regulation requires that "The proceedings in Government contests shall be governed by the rules relating to proceedings in private contests."

The notice published under §613 (a) cannot function as a complaint since it does not contain "a statement in clear and concise language of the facts constituting the grounds of contest". (emphasis supplied). The publication did nothing more than to request mining claimants to file the following information: 1. the date of their mining locations, 2. book and page where notice is recorded, 3. sections in which claims are situated, 4. whether claimant is locator or purchaser, 5. name and address of claimant and persons having interest in the claim. R 241.

The Department's practice of long standing requires a complaint to be filed in a protest or a contest proceeding. Five cases in the record illustrate this established practice. In United States of America, Contestant v. Eleanor A. Gray et al, Contestees, (1960) contests nos. 0-239 to 0-255 inclusive, mineral applications nos. 03034 to 03050 inclusive, it can be seen that the proceedings were initiated by complaints setting forth the grounds of contest. R 225. In U. S. of Am. Contestant v. Caldwell et al, Contestees, Contest No. 146 Oregon (1958) a complaint was served upon the contestees setting forth the grounds of contest. R 216. Likewise, charges were made by complaint setting forth the grounds of contest in U.S. of Am. Contestant, v. Edwards, Contestee (1957), Contest No. 166 Oregon, R 209, U. S. of Am. Contestant v. Santiam Copper Mines, Inc., Contestee, (1957) Contest No. 171 Oregon, mineral application No. 02928. R 202. U.S. Contestant v. Woodard, Contestee (1957) Oregon contests 172 and 173, patent applications 03092 and 03093. R 195.

We have found no case involving protests and contests where a complaint has not been filed. There should be no departure from the established practice in cases under the Surface Resources Act for Congress has said the procedures before the Interior shall be the same.

The Administrative Procedure Act, makes mandatory that no process shall be enforced in any manner or for any purpose except as authorized by law. The act provides: "No process, requirement of a report, inspection

or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law". 5 USCA §1005 (b).

And 1008 (a) of the act provides: "No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law". (emphasis supplied)

The Administrative Procedure Act must be read as a part of every Congressional delegation of authority, unless specifically excepted. Hotch v. U. S. 212 F 2d 280. And in Wong Yang Sung v. McGrath, 339 US 33, 94 L ed 616, 70 S. Ct. 445, it was held that proceedings to which the act applies must conform to the procedural safeguards enacted by the act if resulting orders are to have validity.

An Administrative Agency is a tribunal of limited jurisdiction which may exercise only the powers granted by statute reposing power in it. Pentheny Limited v. Government of Virgin Islands, 360 F 2 786 (CA Vir.Islands) 1966. And when Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. Stark v. Wickard, 64 S. Ct. 559, 321 US 288, 88 L ed 733 (US App. D. C. 1944).

The power of an administrative officer is limited to carrying out a law according to its terms. Fidalgo Island Packing Co. v. Phillips, 120 F. Supp 777, Aff. 230 F 2 638, rehearing denied 238 F 2 234, Cert. denied 77 S. Ct. 262, 352 US 944, 1 L ed 2 237. Hence an attempted investigation

by an agency lacking legal sanction has no better standing than an inter-
 looper. McMann v. S. E. C. (CA 2) 87 F 2d 377, 109 ALR 1445, cert den.
 301 U.S. 684, 81 L ed 1342, 57 S Ct. 785; Railroad Comm. v. Horesta
Natural Gas, 166 SW 2d 117.

Therefore, since sec. 613 (c) makes mandatory that a complaint be
 filed setting forth the facts constituting the grounds of contest, and the
 Administrative Procedure Act makes mandatory agency compliance with the
 procedural requirement of the statute, we respectfully submit that the
 court below erred in holding that "the use of a complaint is averted by
 the publication requirements of the statute. R 44.

II

SINCE THE COURT BELOW FOUND THAT A COPY OF THE PUBLISHED
 NOTICE HAD NOT BEEN SERVED ON THE MINING CLAIMANT, AS REQUIRED
 BY §613 (a), THE COURT ERRED BY FAILING TO HOLD THAT THE PUBLICA-
 TION WAS A NULLITY UNDER §613 (e), AND TO REVERSE THE SECRETARY FOR
 HIS FAILURE TO EXERCISE ADMINISTRATIVE POWER IN ACCORDANCE WITH
 THE STATUTE UPON WHICH THAT POWER DEPENDS.

The court below found that "a copy of the publication was not
 served on the mining claimant as demanded by the state " R 43.

§613 (a) provides that:

"Within fifteen days after the date of first publication of such
 notice, the department or agency requesting such publication
 (1) shall cause a copy of such notice to be personally deliver-
 ed to or to be mailed by registered mail addressed to each
 person in possession or engaged in the working of the land
 whose name and address is shown by an affidavit filed as
 foresaid, and shall cause a copy of such notice to be mailed
by registered mail to each person whose name and address is

set forth in the title or abstract company's or title abstractor's or attorney's certificate filed as aforesaid, as having an interest in the lands described in said notice under any unpatented mining claim heretofore located, such notice to be directed to such person's address as set forth in such certificate; and (2) shall file in the office where said request for publication was filed and affidavit showing that copies have been so delivered or mailed." (Italics supplied)

§613 (e) provides:

"If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person." (Italics supplied)

Unless the requirements of §613 (a) are complied with, then the

Secretary of the Interior has no authority to conduct any hearing or take any procedure with respect to determining the validity of any mining claim under this Act.

The Act makes mandatory that the prosecuting agency "shall"

cause a copy of the publication to be mailed to persons listed in a certificate of title accompanying its statutory letter to the Department of the Interior 30 USC §613 (a).

It would seem clear that Congress intended that failure to comply with this statutory condition would render the attempted publication a nullity. The legislative history is as follows:

"Subsection (e) of Section 5 provides that the publication of notice shall be wholly ineffectual as to any person entitled to be served with, or to be mailed a copy of the published notice, if the notice is not in fact so served upon or mailed to him." U. S. Code, Cong. and Adm. News. 84th Congress 1st Session, 1955, Vol. 2 p. 2486.

An attempt to exercise power without compliance with the provisions of the Act as to the manner and circumstances of its exercise is a nullity. 5 USC 1008(a). Statutory administrative agencies are governed strictly by the statutes from which they derive their existence. N.L.R.B. v. Atlantic Metallic Casket Co., 205 F 2d 931 (CA 5 1950).

Therefore, having found agency non-compliance with the statute, under which the proceeding was brought, the court erred by failing to hold that such attempted exercise of power was a nullity.

III

SINCE THE COURT BELOW FOUND THAT NO CERTIFICATE OF TITLE ACCOMPANIED THE STATUTORY REQUEST INITIATING THE PROCEEDING UNDER §613(a), IT ERRED IN FAILING TO HOLD THE PROCEEDING A NULLITY AND TO REVERSE THE SECRETARY FOR NON-COMPLIANCE WITH THE STATUTE UPON WHICH HIS POWER DEPENDS.

In its opinion, the court below found another instance where administrative power had not been exercised in the manner commanded by the statute. The court said: "No request for publication was accompanied by the required certificate of title or abstract of title. Here the plaintiffs are technically correct..." R 43

A certificate of title is required to accompany the statutory letter initiating the proceeding. The title certificate of an attorney for the Department is sufficient, if it is based on tract indices of mining claims in the county records. If there are no tract indices, the certificate of title must be prepared by a title or abstract company or title abstractor.

The legislative history shows that Congress intended to make a title search mandatory.

"...a copy of the notice must be mailed by registered mail to each person who is shown by a title search to have an interest in the lands." U.S. Code, Cong. and Admin. News, 84th Cong. 1st Session, 1955, Vol 2, p. 2485. (Emphasis supplied).

A "Certificate of non-existence of tract indexes" R 238 is no substitute for a "certificate of title" under 30 USC §613 (a).

It is impossible to reconcile the certificate of Mr. Clarke that there are no tract indexes R 238 with the affidavit of Ralph L. Warstell R 240 that he mailed a notice to each of the mining claimants "... whose name and address is set forth in the certificate of examination of tract indexes relating to land described in said notice".

Congress undoubtedly had in mind the protection of bona fide claimants when it spelled out in the act the procedures to be followed. On the one hand, it wanted to invalidate fraudulent claims; on the other, it recognized that bona fide claimants would suffer from agency harrassment. The legislative history is recorded as follows:

"On the other hand, continual interference by Federal agencies in an effort to overcome this difficulty would hamper and discourage the development of our mineral resources, development which has been encouraged and promoted by Federal mining law since shortly after 1800." U.S. Code, Cong. and Admin. News, 84th Congress, 1st Session, 1955, Vol. 2, p. 2479.

An example of such agency interference to discourage the development of natural resources is found in this case. Without any right to do so Forestry went on the claims with a bulldozer and caused boulders and trees to be hurtled down upon a miner who was working in the discovery pit below. Tr. 204, 214. Mr. Leonard Damon testified: "They dumped a tree -- it was six feet across in there -- on some of us and our work, and we had to run like the devil to get out of there." Thereafter, although it was dangerous to do so, he cleaned out the discovery pit two or three times, and each time it was filled up by Forestry, so Mr. Suchy, Mineral Examiner, could not sample the pit. (Tr. 197, 198, 204, 205, 210.) After fleeing for his life and cleaning out the pits, the poor prospector had a heart attack and later testified with difficulty at the trial. Tr. 199. Not a jot of evidence in the record contradicts these facts.

In its effort to protect bona fide mining claimants, Congress must have had in mind the effect of §612(c), which prohibits a miner from severing, removing or using surface resources subject to the management of the United States, and that of §612, which prohibits the Government from "material interference with mining". What to the Secretary is not a material interference can be and often is to a miner a substantial interference, which as a practical matter, often does prevent him from mining.

The intention of Congress is defeated and the statute becomes meaningless if one by one technical safeguards commanded by the manda-

tory "shall" are disregarded. Lifting limitations on administrative power might very well result in its abuse. Agency power enforcing its edicts is not law when it transcends the limits of a lawful authority, even when acting in the name and wielding the force of the government. Hurtado v. California, 110 U.S. 516, (1884).

Therefore, since a certificate of title, showing the names of the mining claimants was a mandatory requirement of the Statute, the department's view that no title certificate was necessary should be corrected.

IV

SINCE THE UNDISPUTED FACTS SHOW THE DISCOVERY OF LODES IN CLAIMS MINERAL IN CHARACTER CONTAINING ORES OF HIGHER VALUE THAN SIMILAR ORES MINED IN THE UNITED STATES, IT WAS ERROR FOR THE DISTRICT COURT TO HOLD THAT THE EVIDENCE FAILED TO ESTABLISH A MINERAL DISCOVERY UNDER THE MINING LAW.

We agree with the Secretary's statement that, "The primary dispute in this case is not over the facts, but over the legal significance to be given to the established facts." R 24.

The statutes require that lands valuable for minerals shall be reserved for mineral entry (30 USC §21); that all valuable mineral deposits shall be open to exploration and purchase (30 USC §22); but that no location of a mining claim shall be made until the discovery of a vein or lode has been made within the limits of the claim located (30 USC §23).

In Jefferson-Montana Copper Mines Co., 41 L. D. 320, the Department outlined the elements of a valid discovery as follows:

1. There must be a vein or lode of quartz or other rock in place;
2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;
3. The two preceding elements, when taken together, must be such as to warrant a prudent man in expenditure of his time and money in the effort to develop a valuable mine.

The three elements of a valid discovery were established by evidence offered by the Government in its case.

a. First, lodes were discovered. The lodes on the Edith and Paymaster claims are approximately half a mile in length. Exhibit C. See original scale R 152. They are on a major fracture in the earth's crust.

Tr. 75. The fracturing makes an underground plumbing system for mineral solutions to come up from below and form veins. Tr. 74. A sulphide zone extends through the Edith and Paymaster claims. Tr. 75. This is a favorable factor which would induce development of the claims. Tr. 75.

On the Edith there are parallel veins, some larger than others. Tr. 74. Whether the veins are productive in large quantities or small quantities of ore is yet to be determined. Tr. 75. Massive sulphides of base metals are in the sulphide zone on the claims. Tr. 40. See pp. 8-11 this Brief.

"Sulphide zone" is defined as "That part of a lode or vein not yet oxidized by the air or surface water and containing sulphide minerals." American Geological Institute Dictionary of Geological Terms, Doubleday & Company, Inc., N. Y. (1962).

The courts have defined the term "lode" as used in the statute authorizing the location of mining claims. A body of mineral or mineral

bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as the lode, whatever the boundaries may be. In the existence of such a body, and to the extent of it, boundaries are implied. On the other hand, with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Cheesman v. Shreeve, 40 Fed. 787, 795, 17 Morr. Min. Rep. 260.

b. Second, Valuable minerals were discovered in the lodes. Gold, silver, copper, lead and zinc minerals of commercial grade were found in the lodes. Exhibit 27, R 126, Exhibit 28, R 127. See pp. 11-13 this Brief.

The Government's witnesses established by their own testimony in the Government's case in chief that:

- i. The average value of the ores discovered in the lodes on the claims exceeds the average value of the same ores mined in the United States.
- ii. The average value of lead and zinc ores mined in the United States is \$12 to \$14 per ton (Tr 117), and the average for copper ores mined in the United States is \$6 per ton (Tr 118).
- iii. The Government's samples of the lode on the Edith claim average \$31.10 per ton. (Exhibit 28) R 20
- iv. The Mining Claimant's 22 samples of the lode on the Edith claim average \$56.64 per ton. (Exhibit 28) R 20
- v. The Government's sample of the ore in the lode on the Paymaster claim was \$29.50 per ton. (Exhibit 27) R 20
- vi. The Mining Claimant's samples of the ore in the lode on the Paymaster claim averaged \$122.25 per ton. (Exhibit 27) R 20

- vii. Mr. Suchy, Mining Engineer for the Government, advised Mr. Converse to spend time and money doing further bulldozing and drifting on the veins. Mr. Converse' reliance on this advice is justified. Tr 100.
- viii. Mr. Suchy, as a prudent man, said if the claims were his, he would do bulldozing and drifting on the vein. It would be justifiable to spend more money on the property in an effort to determine the extent of the ore body. Tr 100, 101.

The decision of the Trial Examiner was affirmed by the Secretary.

And the Secretary thus adopted two requested findings which this court may wish to accept as establishing minerals of sufficient value in the lodes as being discoveries as a matter of law. The Examiner found that six samples taken by the mining claimant from or near the discovery cut in the north half of the Edith claim were taken from the mineral parts of the vein at the places indicated on Exhibit 28. They average \$36.42 per ton. Tr 23, Ex. 28, Finding No. 7, see page 20 of this brief. And this finding, approved by the Secretary, shows average values approximately three times the average values of similar ores mined in the United States. Tr 117, 118.

The Examiner found that four samples taken by the mining claimant and one taken by the Government in the adit on the Paymaster claim averaged \$74.20 per ton. Ex. 27, Finding No. 14. See pages 23 and 24 of this brief. And this finding, affirmed by the Secretary, shows average values approximately five times the average values of similar ores mined in the United States. Tr 117, 118.

As a matter of law, the Department determined in Woodard and Belisle that lower values in lodes were sufficient discovery. The same kind of

minerals were found in those cases as in the present one. In each of those cases, the Government rejected the evidence of the Government's specialists. And based upon the evidence of the mining claimant decided that mineral discovery had been established as a matter of law. A copy of the Woodard decision was placed in this record by the appellee R. 195. The Belisle decision has been placed in this record by the appellant R. 266.

In United States v. Woodard, Oregon Contest 172, 173 (1957) it was held that:

"In regard to the Sampson claim, more substantial evidence of mineralization was found. Three out of four mineral examiners found assay values from \$4 per ton for a 50 inch sample to \$28.29 per ton for a 10 inch sample (Table A) in a vein structure with both width and consistency. I conclude that the evidence of mineralization is sufficient to justify the belief that there is a reasonable prospect of success in developing a valuable mine on this claim and that there has been a valid discovery. Accordingly, the Sampson, together with the Fraction Amended and Luckey Strike are declared valid lode mining claims."

In United States v. Belisle, Colo 034358 (1966), a case under the

Surface Resources Act, it was held that:

"Mr. Roberts testified that ore having a value of \$20 a ton is a working proposition. The sample taken from the Black Dragon by Mr. Belisle in 1965 from near the surface contained minerals of considerably higher value than \$20 a ton. The sample taken from the Black Jack claim in 1950 showed values of \$49.90 per ton. Add to this evidence the evidence of the mineral exposed in the workings underneath the Black Jack and it is clear that the mining claimant has successfully refuted the prima facie case presented by the Forest Service."

"The 'prudent man' rule as expressed in Castle v. Womble, 19 L. D. 455 (1895) is that a valid discovery of mineral has been made where the evidence is of such a character that a person of ordinary prudence

would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. In the present case, the evidence shows clearly that this test has been met, indeed exceeded, by the mining claimant."

c. Exploration and development work mean the same thing insofar as they relate to the effort to make a mine out of a particular ore deposit that has been discovered. By equating "prospecting" with "exploration work" the Assistant Solicitor departs from long-established rules of property. And if his decision stands, mining titles are placed in jeopardy. His decision departs from the established law of discovery and makes discovery depend upon whether the kind of further work justified to be done on the claims is called "exploration" or "development". After a discovery of a lode containing valuable minerals has been made, it is immaterial whether the further work done on that particular mineral deposit is to delineate the extent of the ore body and is called exploration, or whether the work is making the stopes ready to extract the minerals from the deposit and is called development. Either kind of work contributes to make a mine of the property.

The Solicitor's error is his definition of exploration work as being "that which is done prior to discovery in an effort to determine whether the land contains valuable minerals" R25. In our case here, the Government has established by its evidence that the land does contain valuable minerals and the average value of those minerals exceeds the average value of similar minerals mined in the nation. Hence the rationale of the administrative decision is erroneous. It is not correct to say that if the further work a reasonably prudent man would

be justified in performing is exploration work, he has not made a discovery, but if it is development work, he has.

The Government's expert, Mr. Suchy, testified that exploratory work and development work overlap, (Tr 89). He said that the same kind of work may be either exploration work or development work. Driving a shaft in country rock may be either development or exploration (Tr 89). Likewise, a crosscut, whether in ore or not, may be described as development or exploration (Tr 90). Diamond drilling (Tr 89), drifting (Tr 89) bulldozing (Tr 85) may be development work or exploratory work. Therefore, since the terms development and exploration overlap, the courts have wisely considered them as having an equivalent meaning with relation to the law of discovery.

The case of Charlton v. Kelly 156 F. 433, 436, (9th Cir. 1907) clarified the statement of the prudent man rule in the Castle v. Womble, 19 L. D. 455 (1894) case and in Chrisman v. Miller, 197 U.S. 313 (1905) by explaining that the word "development" was used there as the equivalent of "exploration". This interpretation of the rule was quoted with approval by the Department in the more recent case of U. S. v. Mouat, 61 L. D. 289, R.79

In Charlton the court said at page 436:

"The principal objection made to the charge on this branch of the case is that the court instructed the jury that the mineral discovered must, in order to constitute a discovery, be of such quantity and character and found under such circumstances as to justify a man of ordinary prudence in the expenditure of his time and money in the development of the property. It is argued that a discovery sufficient to justify the expenditure of time and money in the development of a

mining claim must necessarily be greater than that which is necessary to justify the expenditure of time and money for the purpose of exploration, with the reasonable expectation that, when developed, the claim will be found valuable as a placer mining claim. Counsel for the plaintiffs in error have assumed for the word "development" a broader meaning than was intended in the charge. The court did not mean that, in order to comply with the law, there must be such a discovery as to justify the expenditure of time and money upon a claim to the extent of opening up the whole thereof and acquiring an exhaustive knowledge concerning its resources. The word as it was used by the court, and as in connection with the whole charge it must have been understood by the jury, was equivalent to the word "exploration", and was used in the sense in which it was employed in *Chrisman v. Miller*, 197 U.S. 313, 323, 25 Sup Ct. 468, 470, 49 L. Ed. 770, in which the court thus quoted with approval the language of Mr. Justice Field in a prior case: "The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify the expenditure of money for the development of the mine and the extraction of the mineral." (Italics supplied)

d. Standard for Discovery. The Department has failed to apply correctly to the facts found in the present case the standard for discovery set forth in Castle v. Womble, 19 L. D. 455 (1894). We agree with the long-established interpretation of Castle v. Womble by Curtis H. Lindley in his Treatise on the American Law Relating to Mines and Mineral Lands (1914), a recognized authority on the subject, often quoted by the courts. He says in Vol. 2, (3rd ed) at page 36:

"The land department, whose function it is to determine in all applications for patent what constitutes a discovery, has uniformly adopted a liberal rule of construction. In the judgment of the tribunal, a mineral discovery sufficient to warrant the location of a mining claim may be regarded as proven when mineral is found and the evidence shows that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success." Lindley cites *Castle v.*

Womble, 19 L.D. 455; Walker v. SPRR Co., 24 L.D. 172; Michie v. Gothberg, 30 L.D. 407, Chrisman v. Miller, 197 U.S. 313, 322, 25 Sup. Ct. Rep. 468, 49 L ed 770; Charlton v. Kelly, 156 Fed. 433, 436, 84 S Ct. Rep. 468, 49 L ed. 770; Lange v. Robinson, 148 Fed. 799, 803, 79 CCA 1; Garibaldi v. Grillo, 17 Cal. app. 540, 120 Pac. 425, 426; Madison v. Octave Oil Co., 154 Cal. 768, 99 Pac. 176, 178; In re Yard, 38 L. D. 59.

In the present case, the Department is actually imposing a requirement that a developed immediately mineable body of ore be found to support mineral discovery at the same time that it disavows doing so. At page 5 of his decision, in the administrative file Exhibit 1, the Assistant Director wrote:

"Contrary to the claimant's assertion, the Department does not require a showing that a mining claimant has encountered a deposit which would be commercially profitable immediately. A valuable mine need not be a profitable one. Nevertheless, 'the nucleus of value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result'. United States v. Santiam Copper Mines, Inc, A-28272, June 27, 1960."

That prize bit of double talk reasserts that "discovery" means a deposit ready to be mined. Both the Assistant Director and the Assistant Solicitor take shelter behind the Administrative Decision A-28278, July 17, 1961, U. S. v. Clyde R. Altman et al., 68 I. D. 235.

The Altman case is like the Santiam case, a link in the chain of administrative precedents created in recent years in order to alter the Castle definition and expand the discovery requirement. The Solicitor's quotation from Altman equates "exploration work" to "prospecting" by defining it as "that which is done prior to a discovery in an effort to determine

whether or not the land contains valuable minerals." It holds that discovery is not accomplished until the exploratory work has determined that minerals exist in such quantities that it will pay to mine them. See Assistant Director's opinion p. 5 and Assistant Solicitor's opinion p. 9. Adm. File Ex. 1.

We are concerned here with a major structure, a lode of major proportions, not with stringers, pods, veinlets or lenses of no more than a few hundred pounds of ore, as was found by the Secretary in the Pruess case Contest 0-213 Oregon 1960, Affd A 28641 August 22, 1965. In Pruess it was held that:

"Under the prudent man rule the actual discovery of valuable ore is not essential to a sufficient and adequate discovery. A valid discovery is made where there is discovered a mineral-bearing vein possessing in and of itself a present or prospective value for mining purposes."

"Even though pay ore is not exposed, the validity of discovery would be established if the evidences of mineralization are such as would induce a prudent man in further expenditures in the probability that the veins exposed will lead to greater values if mining operations for the exploitation of the claims are undertaken. By "probability" we do not mean mere conjecture, hopes or beliefs that a deposit may exist - but if similar geological conditions elsewhere have led to greater values at depth, then it would appear that a prudent man would be justified in undertaking mining operations to follow the lode in the anticipation, the probability, of encountering richer (commercial) values in those claims." P. 5

In the case of Narver v. Eastman, 34 L. D. 123 (1905) quoted with approval in U. S. v. Mouat, 61 L. D. 293 (1954). The Secretary pointed out: "It does not follow that because there is no clear profit arising from the sale of an article that has been manufactured or produced, that it therefore has no

commercial value." In that case, the cost of quarrying and transporting building stone was shown to be about five times the price the stone would bring at the then current market. The claimant's stone application was allowed in spite of a finding below that these costs left the stone without any commercial value whatsoever. The Secretary held that the commercial value of an article does not depend upon whether it can be produced and sold at a profit.

Sufficient of the thing itself must be found, within the claim, and not just in the neighboring area, to justify the prospector in making further efforts to obtain more of that mineral from that particular deposit. Cascaden v. Bortolis, 162 Fed. 267; Jefferson-Montana Copper Mines Co., 41 L. D. 320; Chrisman v. Miller, 25 S. Ct. 468.

For the foregoing reasons, we respectfully submit that the court below erred in holding that "Manifestly, the testimony of the Government's witnesses was sufficient to create a prima facie case in favor of the Government's position." R 46. For a discovery was established by the Government as a matter of law, and the court below should have so corrected the administrative decision.

SINCE THE SECRETARY UPHELD THE EXAMINER'S DENIAL OF MINING CLAIMANT'S RIGHT TO MAKE OFFERS OF PROOF FOR THE RECORD ON APPEAL, THE COURT BELOW ERRED IN UPHOLDING THE DECISIONS OF THE SECRETARY

The Examiner ruled that the Mining Claimant could not make offers of proof for the record by stating into the record evidence he proposed to offer. Exceptions were saved to the denial of the right to make offers of proof with respect to the testimony of Dr. Albert J. Walcott, Tr 174; of Mr. Converse Tr 24, 25; of Mr. Suchy, Tr 58 - 61 and Tr 67; and of Floyd Persons, Tr 143, 148.

The Mining Claimant made his position clear to the Hearing Examiner below that it would be error to refuse Mining Claimant the opportunity to make offers of proof for the record on review. The following quotation of the record shows this:

MR. MURRAY: "Well, we make our usual offer under the rule on this evidence, and I suppose there will be the same ruling."

HEARING EXAMINER HOLT: "That's correct. Under what rule?"

MR. MURRAY: "Under the rule that permits us to make our record for appeal. Unless the witness is permitted to testify, the Examiner on appeal cannot determine what the answer to the question would be, and, therefore, if there should be error in sustaining the objection, then the Claimant has no way of showing what the evidence would be, had he been permitted to testify, unless he is permitted to testify over the objection, and the rule, as I understand it, is a well recognized rule, and you can always show what the testimony is, subject to the objection, and for the purpose of making a record."

"Otherwise, it would be entirely possible to sustain an objection to any evidence being offered by the Mining Claimants, and then, on review, there would be nothing before the Examiner to review unless

the Mining Claimant went further over the objection and put into evidence the facts supporting his side of the case."

"It's tantamount to a denial of due process to refuse to permit a Mining Claimant in a proceeding of this kind the right to introduce his evidence. Certainly, it might be objectionable evidence in the view of the Examiner, but, in the view of a reviewing body on appeal, It might be deemed proper evidence, but to prohibit the Mining Claimant from making his record, certainly, is a denial of due process."

HEARING EXAMINER HOLT: "All right."

MR. MURRAY: "That's what it amounts to when we are denied the right to offer evidence to make our record here, the denial of a right to be heard on an appeal, as well as at this stage of the proceedings."

HEARING EXAMINER HOLT: "All right. The ruling has been made. Let's proceed."

MR. MURRAY: "We'll have to take an exception to this whole line of ruling on the part of the Hearing Examiner because---on the grounds that we are being denied a hearing, denied the right to present the pertinent evidence on appeal, and we save that exception to all the previous rulings on this same objection or line of objections that have been made."

HEARING EXAMINER HOLT: "Very well."

MR. MURRAY: "For the purpose of the record, it's my understanding that the ruling is that we are not permitted to make offers of proof, or to make a record."

HEARING EXAMINER HOLT: "Not in the manner suggested by Counsel." Tr 148-150.

The Administrative Procedure Act, 5 U.S.C. §1005 (b) provides that,

"The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts..." This the Department refused to allow.

In Downie v. Powers et al, 193 F 2d 760 (10th Cir. Dec. 20, 1951), it was held that the spirit of the mandate of the Rule 43 (c) 28 USCA permitting offers of proof of excluded testimony to be made for the record cannot be ignored. The purpose of the rule permitting the examining attorney to make a specific offer of what he expects to prove by the witness' answer to an excluded question is to enable the examining attorney to make such a record that an appellate court can determine whether there was reversible error in excluding the question. See Moore's Federal Practice, Vol 3, p. 3076.

In Pennsylvania Lumberman's Mutual Fire Insurance Co. v. Nicholas, 253 F ed 504, 506, the court said:

"Appellants also complain of the refusal of the trial court to permit them to prove or even make their proffer of proof as to certain of their other defenses. Of course any evidence they wish to tender that would tend to establish their defenses should be received by the court, and as to any which the court considers irrelevant, immaterial or otherwise improper, the parties must be given ample opportunity to put in the record a fair statement so that the appellate courts can intelligently pass upon the challenged rulings of the court."

Mining claimant was denied opportunity to put into the record the testimony of Mr. Suchy as to the dimensions in width, length and depth of ore he sampled, from which the number of tons of ore could be calculated. With three dimensions, the witness could have calculated a body of ore based upon his sampling of the lode. The transcript is as follows:

"Q (By Mr. Murray): What would be the reasonable projection of the depth of the ore that you found at E-28 and E-21, or either one of those points, if there is any difference in what would be the reasonable projection of the ore in determining either the indicated ore, or the inferred ore?"

Mr. Clarke: I object, Mr. Hearing Examiner. There has been no showing so far that there's any ore; secondly, again, we are going into matter that are not the subject of direct examination. We're exploring the development work, the exploration work that has been completed subsequent to the passage of Public Law 167.

Hearing Examiner Holt: The objection is sustained.

Mr. Murray: I will ask the witness a question over the objection for the purpose of preserving my record and making an offer of proof.

Hearing Examiner Holt: All right, denied. Tr 64-67.

It was particularly prejudicial to deny mining claimant opportunity to preserve in the record for review the testimony of Dr. Albert J. Walcott, who had earned his doctorate in mineralogy. When he started to give the results of his on the ground examination, the contestant objected. The objection was sustained. The examiner refused to allow claimant to make an offer of proof to show on appeal what the doctor's testimony would be were he permitted to testify. An exception was taken to the Examiner's ruling. Tr 174.

To us, justice points to a denial of "Due Process". And here, the mining claimant will not be met with the administrative objection that a constitutional question cannot be raised for it is forbidden by the rules of practice of the Department of Interior. Tr 6, 7.

VI

SINCE THE MINING CLAIMANT'S REQUESTED FINDINGS 9, 10, 11, 13, 16 AND 17 WERE MATERIAL TO THE ISSUES AND WERE SUPPORTED BY SUBSTANTIAL EVIDENCE UNDENIED, THE COURT BELOW ERRED IN FAILING TO CORRECT THE ADMINISTRATIVE DECISION AS TO EACH SUCH REQUESTED FINDING.

We do not ask this court to weigh the facts. We ask that the proper rules of law be applied to the established facts. First, was there error in rejecting requested findings 10 and 11 as immaterial? Second, can mere assumption be made to substitute for substantial evidence?

Requested Finding No. 10. The Government's assays of four samples averaging \$31.10 per ton were taken by Mr. Suchy from the fracture zone structure on the Edith claim in the area of an outcrop south of the McQuad Creek. Tr 53-56, Exhibit G. The assays are listed on page 21 of this Brief.

Requested Finding No. 11. The mining claimant's assays of sixteen samples averaging \$66.24 per ton were taken on the Edith claim in an area south of the McQuade Creek. Exhibit 28. See assays of sixteen samples and the value of each on page 22 of this Brief.

All of the samples assayed and listed in the requested findings were received in evidence. But they were rejected and not taken into account by the department in making its decision. These samples taken after July 23, 1955, the effective date of the Surface Resources Act, did not evidence a new discovery and should not have been rejected on that pretext. Since the lode had been discovered prior to the effective date of the act the Government's samples and the mining claimant's samples of the same lode in the

south half of the Edith claim should have been considered as evidence establishing the value of the minerals in the discovered lode. Digging into the ground to expose fresh rock in place and cutting a sample from that rock in a discovered lode does not constitute a new discovery. Such sampling merely confirms the mineral values in the lode already known to exist. The fact that a lode did exist has been established. See pp. 8-15 and pp. 44-45.

Requested Finding No. 9. In 1951 an outcrop was discovered in the southerly part of the Edith Claim. Work was done on the outcrop before the access road was constructed. Fresh rock at this point exposed the same vein also seen in the cut to the north near the middle of the claim. Tr 192-196. The Government's evidence established that a sulphide zone or lode extended through the Edith Claim.

Ford M. Converse testified for the Government. Since there is nothing in the record to show that he was called as an adverse witness, the Government is bound by his testimony. He located the Edith and Paymaster claims in 1951. Tr 9. In the last five years he has spent \$10,000 developing the claims. Tr 206, 207. Mining claimant's exhibits 1 through 22, assay certificates, were received in evidence on stipulation of counsel. Tr 8. The red circles on the maps of the Paymaster and Edith claims show the places where samples of ore were taken. The numbers in the red circles correspond to the exhibit numbers of the assay certificates shown on the table of assays of samples on exhibit 27, map of the Paymaster, and exhibit 28, map of the Edith claims. Tr 18, 19, 21, 22.

There was no evidence offered by the Government to deny or contradict that an outcrop was discovered and work was done on it in the southerly part of the Edith claim many years before the road was put in. Tr 193, 194. Fresh rock at this point exposed the same vein also seen in the cut to the north near the middle of the claim. Tr 192-195. Mr. Leonard referred to Exhibit E. He said he knew and others also knew about 1926 that there was an outcrop in the south half of the Edith claim at the points indicated, Ex. 28, Ex. 25, Ex. 21 on Exhibit E. The outcrop of ore in the southern half of the claim was connected up with the vein exposed at the discovery cut, Post No. 1 in the north half of the claim, Ex. 28. The same lode that was exposed at the point in the road by Ex. 28 south of McQuade Creek on the southern half of the Edith claim. Tr 194-195.

Richard A. Smith testified that he found the vein along the lode line all the way through the claim. Tr 185. He has been a miner for about 30 years who had done a lot of prospecting and who had worked on the claims, put a cross on Exhibit 28, map of the Edith, showing where sample 33 was secured in the south half of the Edith. Mr. Clarke objected to the exhibit as coming from a road cut and a place which has been shown to have been exposed subsequent to 1955. The Examiner overruled the objection and said: "Well, now, this witness has testified that he found the vein along the lode line all the way through the claim. But he did not take this sample of the stipulated value from \$38.80 to \$57.00 into account in his decision,

nor did the Assistant Solicitor do so in his opinion written for the Secretary.

Requested Finding No. 13. That on the Edith claim there is a vein of quartz or rock in place. The quartz or other rock in place carries gold, silver, copper, lead and zinc. We also requested that the conclusion be made that the occurrence would justify a prudent man in the expenditure of his time and money in the effort to develop a valuable mine. This request was denied for the reasons set forth in the administrative decisions. Actually there was no denial of the facts in the decision but merely a failure to conclude as requested.

Requested Finding No. 16. Requested that a finding be made of a discovery on the Paymaster claim. This was likewise denied for reasons set forth in the decision. But actually there was no denial of the facts just a conclusion about the facts.

Requested Finding No. 17. On the Paymaster claim there is a vein or lode of quartz or rock in place which carries gold, silver, copper, lead and zinc. This is not denied. But the conclusion requested was denied in the decision. The Examiner held, "there was sufficient evidence of mineralization to induce a prudent man to retain the claims until a road had been constructed and until more extensive exploration had been completed". Adm. File, Decision of January 29, 1963, p. 8. In arriving at this decision the Examiner did not take into account the assays of samples listed in requested findings 10 and 11, pages 21, 22 of this Brief.

Bound as we all are by the record in this case, it seems reasonable to conclude that agency assumptions are no substitute for evidence. An administrative decision based on assumption and not upon substantial evidence should be corrected.

VII

SINCE IT APPEARS FROM THE NOTICE OF HEARING OF FEBRUARY 14, 1962, THAT THE CHARGE OF WANT OF DISCOVERY WAS ASSERTED BY THE HEARING EXAMINER OVER HIS SIGNATURE AT THE REQUEST OF FORESTRY, THE PROSECUTING AGENCY, THE COURT BELOW ERRED BY FAILING TO HOLD THAT MINING CLAIMANT'S MOTION FOR CHANGE OF HEARING EXAMINER SHOULD HAVE BEEN ALLOWED UNDER THE ADMINISTRATIVE PROCEDURE ACT, 5 USC §1004 (c).

The Administrative Procedure Act specifically forbids the Hearing Examiner from acting under the direction of those engaged in the prosecuting function. The court below erred in equating the notice of hearing, to a pre-trial order because a pretrial order contains a statement of the contentions which each party proposes to prove. The notice of hearing signed by Examiner Holt presents the charges asserted at the request of forestry, the prosecuting agency.

A hearing examiner shall not be subject to the "...direction of any officer, employee, or agent engaged in the performance of investigating or prosecuting functions for any agency". (underscoring supplied). 5 USC 1004(c) This clear command forbids a hearing examiner from acting under direction of those engaged in the prosecuting function, and representing "any agency" in the "prosecuting function".

The House Committee on the Judiciary, House Report No. 1980, May

3, 1946, when considering the Administrative Procedure Act, commented that when the same men are obliged to serve both as prosecutors and judges:

"This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings, which the Commissioner, in the role of prosecutor, presented to itself."

U.S. Code Cong. and Adm. Service, 79th Cong., 2d Session (1946).

The record speaks for itself:

"Mr. Murray: Mr. Hearing Examiner, for the purpose of the record at this time, we would like to file under the Administrative Procedure Act, Title 5, Section 1006 (a), a motion to change the Hearing Examiner, supported by the affidavit of Mr. Ford Converse.

I will hand the original to the Hearing Examiner and a copy of the motion to Counsel.

....

"Mr. Clarke: Mr. Hearing Examiner, I object to this motion. I think it is strictly self-serving. It shows no basis in fact of prejudice on the part of the Hearing Examiner.

"Hearing Examiner Holt: I am going to deny the motion. I think, if you had filed it ten days or so ago, I could have had a different Hearing Examiner at the hearing.

"Mr. Murray: We had no way of knowing who was going to be the hearing examiner until this morning, and therefore, the motion could not have been filed previously.

"Hearing Examiner Holt: All right. The motion is denied.

....

"Hearing Examiner Holt: I don't deny the facts. I just deny the motion. You may make an offer of proof, if you care to. (Emphasis supplied)

"Mr. Murray: The offer of proof, of course, could take two forms. One would be to call the Hearing Examiner to testify and offer that testimony, or we could state what we propose to prove, and the Hearing Examiner can act upon that statement.

"Hearing Examiner Holt: You may state what you propose to prove.

"Mr. Murray: We propose to prove the averments of Mr. Converse in his affidavit by the testimony of the Hearing Examiner; in support of the motion, that the case, in effect, has been pre-tried, and, therefore, this hearing would be more or less a vain and useless gesture, as well as the other averments of facts and conclusions averred in the affidavit of Mr. Converse." Tr 34, 4, 5.

CONCLUSION

There are several good reasons why this court may wish to correct the decision below.

When Congress delegates agency power and spells out the procedures under which that power may be exercised then it would seem desirable that our courts should enforce those safeguards.

The expertise of the courts better qualifies them to decide law. Especially is this so when property rights are involved. Since titles to all mining claims are made to depend upon the discovery requirement it would seem important for our courts to correct all administrative attempts to depart from the established law.

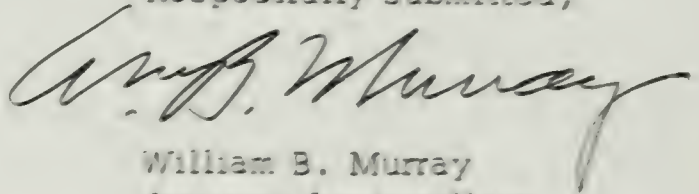
Basic to the rights of every citizen is the right to be heard. A citizen denied the right to make offers of proof for a record on appeal is a denial of the right to be heard. It is a denial of "Due Process".

It would seem desirable to correct the administrative holding which

rationalizes to itself its own conclusion by dividing the established facts into two parts and rejecting that part which does not support its position.

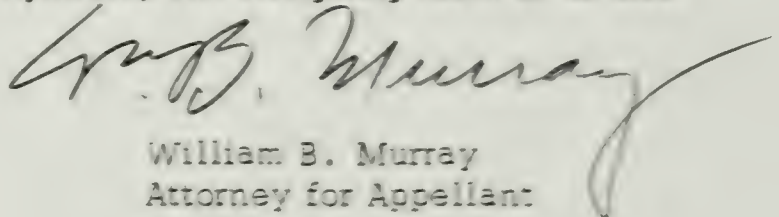
The Administrative Procedure Act applies to every delegation of agency power and its purpose is to set up standards of fair dealing with citizens in an ever increasing powerful bureaucracy.

Respectfully submitted,



William B. Murray
Attorney for Appellant
525 Failing Building
Portland, Oregon 97204
226-3819

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



William B. Murray
Attorney for Appellant

NO. 21697

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FOR THE NINTH CIRCUIT

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v.

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APPELLEE.

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FOR THE DISTRICT OF OREGON

SUPPLEMENTAL BRIEF FOR THE APPELLANT
(DISCUSSION OF UNITED STATES v. COLEMAN)

FILED

MAY 8 1968

WM. B. LUCK CLEER

William B. Murray
Attorney for Appellant
525 Failing Building
Portland, Oregon 97204

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A careful reading of Coleman¹ will show that it has no application by analogy to Converse. Coleman affirms and does not change the "prudent man rule" in Castle v. Womble² followed in Chrisman v. Miller³, Cameron v. United States⁴ and Best v. Humboldt Placer Mining Co.⁵

¹United States, et al, Petitioners v. Alfred E. Coleman, et al, No. 630 - October Term 1967, April 22, 1968, A-1; Coleman v. United States 363 F2 190 (1966); United States v. Alfred Coleman, A-28557 (1962).

²Castle v. Womble 19 L.D. 455 (1894), "After a careful consideration of the subject, it is my opinion that where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase'. For, if as soon as minerals are shown to exist, and at any time during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in the attempt to bring to light and make available the mineral wealth, which lies concealed in the bowels of the earth, as Congress obviously must have intended the explorers should have proper opportunity to do."

³Chrisman v. Miller 197 U.S. 313, 322.

⁴Cameron v. United States 252 U.S. 450, 459.

⁵Best v. Humboldt Placer Mining Co. 371 U.S. 334, 335-336.

Coleman approves "the marketability rule" as one aspect of the prudent man test when applied to building stone which has no intrinsic value. But Coleman teaches that "the marketability rule" is not an issue in regard to minerals of intrinsic value, for these are in small supply and in great demand and command a good market price. A3. This is in accord with the Solicitor's ruling set out in the Appendix A5: "An intrinsically valuable mineral by its very nature is deemed marketable, and therefore merely showing the nature of the mineral," meets the test of marketability. 69 I.D. 145 (1962). A5.

Therefore the mere showing of the nature of the metals gold, silver, copper, lead and zinc in Converse is sufficient to prove locatable minerals of intrinsic value which are deemed marketable as a matter of law. But in Coleman, wide spread quartzite, a country rock, which extends over a vast area must be proven to be a marketable building stone under the marketability rule and the statutes relating to locatable minerals in order to be locatable.

The difference in locatability between minerals of intrinsic value and other valuable minerals is found in the 1872 Act.⁶ Gold, silver, cinnabar, lead, tin and copper have been defined by statute to be locatable minerals as in Converse. Other minerals can be located but it must be shown they are valuable as required in Coleman. The Act of 1872 defines locatable minerals and refers to "veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits . . ." 30 U.S.C. 23.

It was not until some 20 years after the 1872 Act that the 1892 Act⁷ made building stone a locatable mineral.

⁶ 30 U.S.C. 22, Act of March 10, 1872 (17 Stat. 91).

⁷ 30 U.S.C. 161, Act of August 4, 1892 (27 Stat. 348).

In Coleman under Section 3 of the 1955 Act,⁸ common stone was defined not to be a locatable mineral within the meaning of the Mining Law of 1872, including building stone. Since Coleman's claims were located prior to the 1955 Act, it became his burden to prove that his stone was marketable and was found in a deposit in land "chiefly valuable for building stone" under the Act of 1892.

The construction of controlling statutes in Coleman has no application to Converse i.e., whether building stone is locatable under the 1892 Act, 30 U.S.C. 161, and whether it is a common variety of stone under the 1955 Act, 30 U.S.C. 611, simply do not apply to Converse.

In Coleman, it was found that quartzite had no established market. But in Converse, the agency found that the metals were valuable and calculated their market value based on an average price for the years 1957 through 1961: gold \$35 per ounce; silver 90 cents per ounce; lead 12.36 cents per pound; copper 29.7 cents per pound, and zinc 11.62 cents per pound. TR 46. Calculated at these values, samples of ore of the lode in the Edith Claim (Finding No. 7) averaged approximately three times the average of similar ores mined in the United States. Samples from the Paymaster averaged some five times the national average. (Finding No. 14) Appellant's Brief pp. 23, 24, 46.

As observed in Coleman, no prudent man would extract quartzite, having no intrinsic value, for which there is no demand, where there was no reasonable prospect of success. And it follows that a deposit of such mineral would not be a "valuable mineral deposit" within 30 U.S.C. 22. The Supreme Court said, "That the marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence. This is accounted for by the perfectly natural reason that precious metals which are in small supply and for

which there is big demand, sell at a price so high as to leave little room to doubt that they can be extracted and marketed at a profit." It is clear that metals of intrinsic value in a mineral deposit which justify further work, clearly would be a valuable mineral deposit.

As applied to minerals like gold and silver, considered in Chrisman v. Miller, 197 U.S. 313 (1905), there was no question that the end product, the gold and silver, could be sold on the market. Therefore, the present marketability rule inherent in the prudent man rule applied to nonmetallics in Coleman has no application to gold and silver and metallic minerals of intrinsic value in Converse, which are defined by statute to be locatable minerals.

Patents to land were sought in Coleman, but not in Converse. The United States brought action in ejectment and for damages against Coleman in the United States District Court. Coleman counterclaimed and asked that the Secretary of the Interior be required to issue to him patents to 18 placer mining claims which the Department had previously declared to be invalid for want of discovery. The decision of the United States Supreme Court upholding the Secretary is set forth in the Appendix A1-A4. The Interior Department promulgated the marketability rule in Interior Department Decision, Solicitor's Opinion, 69 I.D. 145, Sept. 20, 1962, set forth A5-A6.

Unlike Coleman, the United States brought an administrative proceeding against Converse to make his two lode claims subject to the restrictions of Section 4 of the Surface Resources Act of July 23, 1955, 30 U.S.C. Sec. 612. Converse does not seek patents to the claims. He asks that his possessory title be upheld as valid. He objects to the Government's attempt to apply the Surface Resources Act retroactively to his claims. He maintains that his possessory title was perfected by discovery made prior to the 1955 Act.

The District Court upheld the Secretary, Converse v. Udall, 262 F Supp 583, D.C. Ore. 1966) and Converse was argued in this Court March 18th of this year. The United States Supreme Court decided Coleman April 22, 1968. The Appellee sent a copy of Coleman to this Court, which granted leave to file supplemental briefs discussing whether the Coleman decision has any application to the present appeal in Converse. We think it does not.

The issues differ. In Coleman the Secretary's opinion states that "the only issue in dispute at the hearing on September 16, 1958, was the existence of a market for profitable sales before July 23, 1955."

Actually, in Converse, the fact was undisputed that lodes of rock in place had been discovered, which contained high values in metals declared by the Department to be metals of intrinsic value: gold,⁹ silver,¹⁰ copper,¹¹ lead,¹² and zinc.¹³ Assays averaged several times the values of similar ores mined in the United States and the agency found that a prudent man would be justified in spending time and money on the claims in order to explore this deposit further.

The sole issue in Converse was whether the kind of further work that a reasonable man would be justified in doing to determine the extent of the ore deposit which had been found would come within the rule of Castle v. Womble. The Assistant Solicitor held in Converse that "developing a valuable mine", as used in Castle v. Womble, did not include "exploration work". This Court has held that the word "development" as applied to discovery is the equivalent of "exploration". Harlton v. Kelly, 156 Fed. 433, 436. Development of a mine includes both exploration and stope preparation.

⁹Mineral Facts and Problems, United States Bureau of Mines Bulletin 585, 347, Gold.

¹⁰Id. p. 735, Silver.

¹¹Id. p. 429, Copper.

¹²Id. p. 235, Lead.

¹³Id. p. 975, Zinc.

The Mining Engineers Handbook¹⁴ defines "exploration" as "the work of exploring an ore body when found. It is undertaken to gain knowledge of the size, shape, position and value of the ore body." The Handbook defines "development" as "the driving of openings to and in a proved ore body for mining and handling the ore economically." The Handbook defines "exploitation" as "mining or the work of extracting the ore."

Milvoy M. Suchy, Mining Engineer and Minerals Officer for the Government testified in Converse that exploration work and development work overlap and describe the same kinds of work. He said that if the Converse claims were his he would, as a prudent man, spend money on the claims. He would bulldoze and drift on the vein. It would be justifiable to spend more money on the proper work in an effort to determine the extent of the ore body. Tr 101. He advised Mr. Converse to do so. Tr. 100.

For lode claims containing metals of intrinsic value the Department has outlined the elements necessary to establish a valid discovery on a lode claim in the case of Jefferson v. Montana Copper Mines Co., 41 L.D. 32, approved in Chrisman v. Miller, 197 U.S. 313, cited in Coleman, as follows: (1) There must be a vein or lode of quartz or other rock in place; (2) The quartz or other rock in place must carry gold, silver, cinnabar, lead, tin, copper or other valuable deposits; and (3) The two preceding elements, when taken together, must be sufficient as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine. Converse has met this test.¹⁵

¹⁴Robert Peele, Mining Engineers Handbook (1918), John Wiley & Sons, Boston, Mass., p. 373.

¹⁵See discussion in Appellant's Brief of the following topics: Lodes were discovered pp. 8-11; Valuable minerals were discovered pp. 11-15; National average of ores mined p. 15; Samples of ore taken from claims in Converse averaged several times the value of similar ores mined in the United States pp. 11, 15.

There are issues¹⁶ in Converse that are not issues in Coleman. Converse has asked this Court to determine whether the Department's position that no administrative complaint was necessary to be lodged is correct, and whether the failure to exercise administrative power in accordance with the statutes upon which that power depends make the administrative proceeding in Converse a nullity. Converse has asked whether denial of his offers of proof is denial of trial, and whether requested findings denied were material to the issue, and whether his motion for change of Hearing Examiner should have been allowed. All of these relate to a denial of "Due Process".

Coleman discusses the kinds of minerals locatable under the Mining Law. Not all minerals are locatable. Some are excluded by statute.¹⁷ Common stone was excluded by Coleman. The obvious intent was to reward and encourage the search for minerals that are valuable in an economic sense, and when they are found in a deposit of potential value to reward the discoverer by protecting his discovery as his own.

In Converse¹⁸ the Department found that the land on which the claims are located is mineral in character. "Ruling on requested Finding No. 2." Appellant's Brief p. 18. But in Coleman there was no such finding.

The complaint in Coleman charged that the land was not mineral in character, and it was found that it was not mineral in character. Although we cannot agree that quartzite is "one of the most common of all solid materials" without economic

¹⁶See Appellant's Brief pp. 24-43 and 54-63.

¹⁷Valuable minerals that are not locatable include: deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas (Feb. 25, 1920) 30 U.S.C. Sec. 31; common varieties of sand, stone, gravel, pumice, pumicite, or cinders, 30 U.S.C. Sec. 611.

¹⁸In Converse specific findings of fact were requested. The Department ruled on seventeen requested findings. Appellant's Brief pp. 18-25.

value, we are bound by this pronouncement. Logically it follows that land is not mineral in character if it contains no economic minerals, but if it does, it is mineral in character and valuable within the meaning of "valuable mineral deposits". 30 U.S.C. Sec. 22.

Coleman did not say, at least with respect to discovery of metals of intrinsic value, that a prospector was required to find a fully developed mine, exploitable at a profit in order to meet the discovery requirements, and this Court pointed out in Adams v. United States, 318 F 2d 861, 870 (CA 9, 1963) that the reasonable prospect of success in developing a valuable mine called for by the "prudent man rule" does not require a showing of value in the sense of proved ability to mine the deposit at a profit. And in United States v. Santiam Copper Mines, Inc., A-28272 (1960), the Department held that: "Contrary to the claimant's assertion, the Department does not require a showing that a mining claimant has encountered a deposit which would be commercially profitable immediately. A valuable mine need not be a profitable one."

The Department has long held where minerals are of intrinsic value, as in Converse "no showing that the ore is marketable is required". United States v. Heirs of Stack, A-28157 (1960); United States v. Carnes, A-28178 (1960); United States v. Jungert, A-28199 (1960); United States v. Shuck, A-27965 (1960); United States v. Parkinson, A-28144 (1960) and United States v. Bartron, A-28144 (1960).

For "If it were in the ordinary course of valuable mining claims to appear upon the instant of discovery to be of sufficient value to pay to work them, to make the requirement of these expenditures in development before the issuance of a patent? The whole spirit of the statute and the constructions given by the learned tribunals that have considered them is not that the prospector must find

a paying mine before he can locate his claim. If it were, mining and prospecting . . . would suffer an instant and well nigh total paralysis." Cataract Gold Mining Company, 43 Land Department 248; Shreeve v. Copper Belt Mining Company, 11 Mont. 309, 28 P 314, 323.

The Mining Law of 1872 does not impose any condition as to the value or extent of the ore, but simply provides that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim is located. Mr. Lindley says in his treatise,¹⁹ "No Court has ever held that in order to entitle one to locate a mining claim, ore of a commercial value, in either quantity or quality, must first be discovered. Such a theory would make most mining locations impossible. Logically carried out, it would prohibit a miner from making any valid location until he had fully demonstrated that the vein, or lode, or quartz or other rock in place bearing gold or silver which he had discovered, would pay all the expenses of removing, extracting, crushing, and reducing the ore, and leave a profit to the owner. If this view should be sustained, it would lead to absurd, injurious and unjust results."

And in the case of Narver v. Eastman, 34 L.D. 123 (1905), quoted with approval in United States v. Mouat, 61 I.D. 293 (1954), the Secretary pointed out: "It does not follow that because there is no clear profit arising from the sale of an article that has been manufactured or produced, that it therefore has no commercial value." The Secretary held that the commercial value of an article does not depend upon whether it can be produced and sold at a profit, since even crops which a farmer may market at a loss still have a commercial value.

Wouldn't it be a harsh and cruel interpretation of the law to say to a prospector that you have no claim until you have demonstrated that you can mine

¹⁹Curtis H. Lindley, Treatise on the American Law Relating to Mines and Mineral Lands, Vol. 2, 3rd ed., p. 36.

it at a profit? A prudent prospector may explore and develop his claim, purchase mining and processing equipment, build a plant, enter or establish the market for his ore, excavate and disturb the surface and subsurface only to be told under such interpretation that he is liable for trespass and damages and he has no title for want of a valid discovery. Title depends on discovery. Cole v. Ralston, 252 U.S. 286, 296. Without title he is liable for trespass. United States v. Lease, No. 67-1687; United States v. Burrows, No. 67-808-F, in the same Court (USDC Cent. Dist. Cal.). Did Congress ever intend that title to mining claims should fluctuate from validity to invalidity with the fluctuating prices of the markets for minerals and metals?

For nearly a hundred years, the Mining Law has been liberally interpreted to encourage the exploration and development of mineral resources. This interpretation of long standing has become a rule of property and should not be overturned by the Courts. It has been acted on for a number of years. Udall v. Tallman, 380 U.S. 1, (1965); Barnes v. Poirier, 64 Fed 14, 19 (1894).

On January 26, 1956, Under Secretary of the Interior, Clarence A. Davis, before a Subcommittee on Legislative Oversight of the Senate, Interior and Insular Affairs Committee and the Subcommittee on Power and Natural Resources of the House Committee on Government Operations explained this long standing interpretation. The Congress has not deemed it appropriate to change this law which has served our nation for so long. Mr. Davis said,

"Much of the economy of the Western States has been based upon mining. The results of mining operations are always speculative, since it is never possible to state with certainty the value of the minerals under the ground.

"The patenting of mining claims over the years, therefore, has gone forward by the thousands, based only upon a discovery and the hope that a profitable venture can be developed. This must be remembered in any consideration of mining problems.

"Nevertheless, a few years ago, the Department of the Interior attempted to inject into the mining laws a standard of discovery which required profitable operations and a showing that the mineral deposits had the greater comparative value than other uses. This is not the standard set up by law. The Department has the authority to open and close areas to mining locations. When lands are opened, they are subject to the Mining Law as it exists. When they are closed, no one can even stake a claim on them.

"To allow mining claims to be located and then to judge them on standards other than those set up by Congress and the Supreme Court is administrative legislation.

"If we are to adopt the philosophy that any department of Government is to be vested with such vast powers, then it should be done by an Act of Congress and not by administrative decision."

Mining claims are not a bounty to be handed out by a benevolent fourth branch of Government²⁰ and taken back at will. Perfection of a claim has the effect of a grant by the United States of the exclusive possession of the claim so long as it is kept alive by the performance of the annual assessment work. Nygard v. Dickenson, 7 F 2d 53, (CAA Alaska 1938). There is no requirement to purchase the fee title from the Government for title is as good as if secured by patent. Mason v. Washington Butte Mining Co., 214 F 32, 130 CCA 426 (Montana 1914). There is no requirement to mine the claims or to produce any metals. Bonner v. Meike, 82 F 697, 99 (CC Nevada 1897); Forbes v. Gracey, 94 U.S. 762, 767, 24 L Ed 313. Possessory title to a mining claim is property in the highest sense of that term. Wilbur v. United States ex rel Krushmic, 50 S. Ct. 103, 320 U.S. 306, 74 L Ed 445 (1930); Lesenthal v. Goff, 130 P 2d 248, 63 Idaho 342 (1942).

There is a paradox, a conflict in purpose between agencies of the Department of the Interior. On the one hand, under the Mineral Resources Development Program,

²⁰Franklin D. Roosevelt commenting about the 1937 report of the President's Committee on Administrative Management said, "It was a great document of permanent importance," and took occasion to remark that the practice of creating administrative agencies to perform administrative work in addition to Judicial work threatens to develop a "fourth branch" of the Government for which there is no sanction in the Constitution. U.S. Cong. & Adm. News, 79th Congress, 1st Session 1946, p. 1295.

citizens are encouraged to explore and develop mineral reserves.²¹ Seventy-five per cent of exploration costs are contributed by the Government up to \$250,000 for certain minerals. If ore is encountered and extracted, the loan is repaid out of a five per cent royalty on the ore sold. If ore is not encountered, or if the ore is not extracted for a period of ten years, the loan is forgiven. The money contributed to the exploration by the Government is not taxable as income. The United States Geological Survey and the United States Bureau of Mines do much good work to encourage exploration for minerals. The long range policy of these agencies contemplates the exploration and development of ore reserves and not their immediate exploitation. And a mining claimant must have a valid title based on discovery before he can obtain funds under this program for exploration.

Yet this policy is frustrated by the determined campaign to invalidate mining claims for want of mineral discovery being waged by some agencies. A recent study of Bureau of Land Management proceedings involving challenge to sufficiency of mineral discovery shows that while a mining claimant stands a small chance of receiving a favorable decision on the Hearing Examiner level, a reversal is certain at the Director or Secretary levels, so that any claims which were held valid below will be ruled on adversely before the case can be submitted to judicial review. Clayton J. Parr, Government Initiated Contests Against Mining Claims--A Continuing Conflict, Utah Law Review Vol. 1968 No. 1, p. 114.

This study quotes from an address by Winston S. Howard, 1967 Metal Mining and Industrial Mineral Convention, American Mining Congress, Sept. 10-13, 1967

²¹Mineral Resources Development Program, Senate Report No. 1686, June 11, 1958. House Report No. 2276, July 24, 1958. Act of August 21, 1958, (72 Stat. 700), 30 U.S.C. 641-646. FR Doc 65-2294, FR Doc 65-7220, FR Doc 67-10624.

"Of all the litigating cases in which decisions were handed down or published in the year 1965, not one contested mining claim has been found to be valid." In the only case found by Mr. Parr where the Director found in favor of the mining claimant contrary to an unfavorable decision by an Examiner, a further appeal to the Secretary resulted in reversal against the mining claimant. Op. Cit. 114. and this discourages the production of gold²² and silver and metals upon which our nation depends.

Solicitor Barry stated, "In a sense, in an administrative proceeding within the Department, it is impossible to be a disinterested judge." Hearing on Public Law 167, 106 note 40; K. Davis, 13.05 at 203. This is not surprising where the Solicitor acts as advocate and judge. He provides counsel for the Bureau of Land Management and also conducts the Secretary's review. An Assistant Solicitor could expect no accolades for reversing an Examiner's Decision and finding in favor of a mining claimant contrary to the Bureau's allegations of invalidity.

The suggestion made at page 53 of the Department's Brief to this Court in Coleman that only economic idiots will intentionally produce a product at a loss is a false assumption, for a prudent man may produce minerals at a loss under any circumstances. For instance, he may produce and sell development ore at a loss to reduce the cost of development. He may produce and sell ore at a loss to

²²Gold is a commodity universally accepted as the standard to measure the value of all other commodities. It is our most strategic metal. For the lack of it we have been forced to go on a unredeemable paper money, fiat and printing press money, standard for our currency, the soundness of which determines whether we win or lose the cold wars and the hot wars in which we may engage. Possession of gold was prohibited. Gold Commandeering Act of 1933, 12 U.S.C. 88n. Gold Control Act of 1934, 31 U.S.C. 442. Gold mines were closed during World War II, War Production Board, Order L208, but during World War I manpower was taken from shipyards to mine gold to support our currency and prevent inflation.

protect capital investment in a flooded mine, a struck mine, during a depression, a national emergency, or to hold a labor force. If wealthy, he can make money losing money where losses are deductible²³ from other income and gains are capital gains. He may develop gold reserves in the ground at a loss and thus exchange unredeemable paper money²⁴ of no intrinsic value for gold of intrinsic value. And anyone familiar with the complexities, intricacies and burdens of modern business knows that profits are not usually earned during the establishment of a business and seldom during every fiscal period of a business enterprise.

We cannot agree with the implication that the United States is a sole proprietor of the public lands of Oregon, fifty-two per cent of the State. Its rights are not jus privatum but jus publicum. It is a trustee of the lands.²⁵ Under the Oregon Admission Act²⁶ it was agreed that these lands should be sold and part of the proceeds paid to the State of Oregon. Oregon agreed not to tax the lands. It was agreed that the lands would be sold and placed on the local tax rolls to help bear their share of the cost of local Government. The three original states, Texas and Hawaii retained all of their public lands. In some public land states, the land has been sold and placed on the tax rolls as agreed but not in Oregon.²⁷

²³Legislative History Income Taxes - Mining - Exploration Expenditures, Senate Report No. 1377. Income Taxes - Natural Resources Deduction. 26 U.S.C. 615 (IRC 1954) Exploration Development. Income Taxes - Exclusion from income of Government funds received for Mineral Exploration. 26 U.S.C. 621. Income Tax Regulations - Natural Resources, Sec. 1, 615 (IRC 1954) Sec. 615.

²⁴Clifford L. James, Principles of Economics, Barnes & Noble, Inc., N.Y. 9th Ed. (1956), p. 126, "The paper standard is generally adopted involuntarily. Because of an emergency, such as a war, paper money is issued to pay extraordinary expenses. If the quantity is excessive (and this temptation is great) purchasing power falls and confidence in redeemability is lost. The paper money becomes fiat money or printing press money. The paper standard is always expressed in terms of the specie standard which existed prior to the inflation, but the paper has displaced the specie as the medium of exchange and the standard of value. The United States during the Civil War (greenbacks) and many European nations during the World Wars were on a paper standard."

²⁵U. S. Bureau - The Census, Statistical Abstract of the United States 1966 (87 Edition) Washington, D.C. at p. 198. Federally owned 766 million acres, nonfederally owned 1505 million acres 1965 at p. 197, in United States

²⁶Act for the Admission of Oregon into the Union, 1859.

Unlike Mr. Coleman, Mr. Converse would acquire no title to land or timber. He seeks to prevent his mining claims from being declared invalid for want of discovery, to make them good against withdrawal of the land from mineral entry.²⁸ His aim is to prevent retroactive application of the Surface Resources Act to his claims.

Whether or not the claims are timbered is immaterial to the issue of discovery. If admissible to show Mr. Converse's interest in the case to discredit his testimony, then such evidence has no probative value, for he does not anchor his case on his own testimony. There is no evidence that timber on the claims had any value when Mr. Converse and his father before him went after the minerals in them.

If the timber now would have value greater than the cost of harvesting it, that would not be grounds for invalidating the claims. It has been held in United States v. Iron Silver Mining Co., 128 U.S. 684, that if a mining claimant bought ownership of claims chiefly on account of the value of the lands and timber growing on them, it would not affect the applicant's claims so long as they are supported by mineral discovery. The Supreme Court said, "A prudent miner acting wisely in taking up a claim, whether for a placer mine, or for a lode or vein, would not overlook such circumstances, and they may in fact control his action in making the location." Congress has declared that land, even in national forests, is open to mineral entry. No added burdens are imposed; the land is subject to the mining laws. 16 U.S.C. 482.

²⁸Volume 1 American Law of Minerals, see 2.62; Reservations of Land, 17 Op. Atty. Gen. 230.

CONCLUSION

We have shown that Coleman has no application to Converse by analogy. Coleman affirms the "prudent man rule". It applies the "marketability rule" to determine the locatability of stone of common variety.

But as to metals defined by statute to be locatable, the marketability rule has no application, for they are deemed to be valuable as a matter of law. Therefore, the marketability rule has no application to the metals of intrinsic value discovered in Converse, which are defined by statute to be locatable.

The issue in Coleman was to determine whether building stone was locatable. Converse presents no such issue. In Converse, there was no dispute that metals of intrinsic value are locatable.

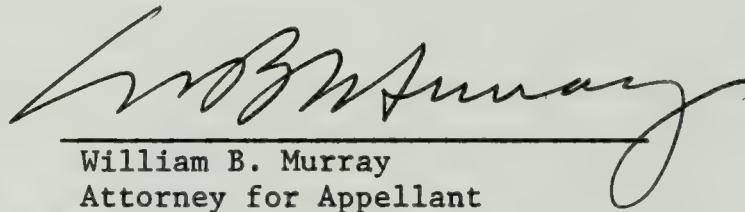
In Converse, the Department found as a matter of fact that the lands were mineral in character. But in Coleman, it was found that they were not.

The question presented in Coleman was whether the building stone had economic value and was a kind of mineral locatable under the statute. The only question raised about discovery in Converse is whether, after a deposit containing metals of intrinsic value has been discovered, exploration work is the kind of work a reasonably prudent man would do in "developing a valuable mine" under the Castle v. Womble rule.

We have shown that "development" includes "exploration" work by definition of this Court and by usage of the mining industry, and it is established by the testimony of Milvoy Suchy, the Chief Minerals Officer in Converse, that "exploration" and "development" work overlap. If the claims were his, he would bulldoze and drift on the vein to determine the extent of the ore body, and he advised Mr. Converse to do so. This work to increase knowledge of an ore body that had been discovered should not be equated to prospecting for an ore body yet unknown.

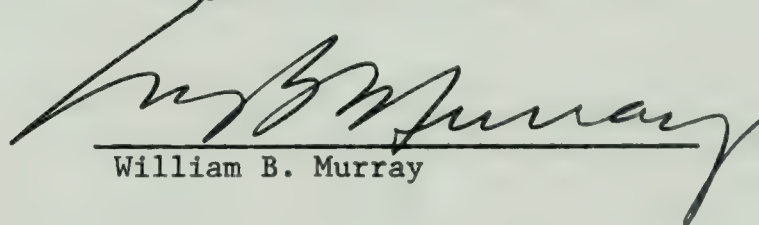
Coleman does not hold that it is necessary to find a mine fully explored and ready to be exploited at a profit before a discovery has been accomplished. It is not necessary to prove that the ore can be mined profitably to meet the discovery requirement. The discovery is sufficient if the discovery is a potential ore producer and there is a reasonable prospect of future profitability after more work has been done to turn the mineral deposit into a mine. Converse meets the test of discovery; Coleman did not.

We respectfully submit that the decision of the United States District Court in Converse should be reversed.



William B. Murray
Attorney for Appellant
525 Failing Building
Portland, Oregon 97204
226-3819

I hereby certify that in connection with the preparation of this supplemental brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the original brief of Appellant filed herein, as supplemented by this supplemental brief discussing the application to this case to the United States Supreme Court's decision in United States v. Coleman, pursuant to leave of Court, are in full compliance with these rules.



William B. Murray

A P P E N D I X

APPENDIX A

SUPREME COURT OF THE UNITED STATES

 No. 630.--October Term, 1967.

United States et al., Petitioners,)	
	)	On Writ of Certiorari
v.	)	to the United States
	)	Court of Appeals for
Alfred E. Coleman et al.	)	the Ninth Circuit.

[April 22, 1968]

Mr. Justice Black delivered the opinion of the Court.

In 1956 respondent Coleman applied to the Department of the Interior for a patent to certain public lands based on his entry onto and exploration of these lands and his discovery there of quartzite stone, one of the most common of all solid materials. It was, and still is, respondent Coleman's contention that the quartzite deposits qualify as "valuable mineral deposits" under 30 U.S.C. Sec. 22¹ and make the land "chiefly valuable for building stone" under 30 U.S.C. Sec. 161.² The Secretary of the Interior held that to qualify as "valuable mineral deposits" under 30 U.S.C. Sec. 22 it must be shown that the mineral can be "extracted, removed and marketed at a profit"--the so-called "marketability test". Based on the largely undisputed evidence in the record, the Secretary concluded that the deposits claimed by respondent Coleman did not meet that criterion. As to the alternative "chiefly valuable for building stone" claim, the Secretary held that respondent Coleman's quartzite building stone as a "common variet[y] of stone" within the meaning of 30 U.S.C. Sec.

¹The cornerstone of federal legislation dealing with mineral lands is the Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. Sec. 22, which provides in Sec. 1 that citizens may enter and explore the public domain and, if they find "valuable mineral deposits," may obtain title to the land on which such deposits are located by application to the Department of the Interior. The Secretary of the Interior is "charged with seeing . . . that valid claims . . . [are] recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450, 460.

²The 1872 Act, *supra*, was supplemented in 1892 by the passage of the Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. Sec. 161, which provides in Sec. 1 in pertinent part: "That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims:"

611,³ and thus it could not serve as the basis for a valid mining claim under the mining laws. The Secretary denied the patent application, but respondent Coleman remained on the land, forcing the Government to bring this present action in ejectment in the District Court against respondent Coleman and his lessee, respondent McClennan. The respondents filed a counterclaim seeking have the District Court direct the Secretary to issue a patent to them. The District Court, agreeing with the Secretary, rendered summary judgment for the Government. On appeal the Court of Appeals for the Ninth Circuit reversed, holding specifically that the test of profitable marketability was not a proper standard for determining whether a discovery of "valuable mineral deposits" under 30 U.S.C. Sec. 22 had been made and that building stone could not be deemed a "common variety of stone" under 30 U.S.C. Sec. 611. We granted the Government's petition for certiorari because of the importance of the decision to the utilization of the public lands. --U.S.--.

We cannot agree with the Court of Appeals and believe that the rulings of the Secretary of the Interior were proper. The Secretary's determination that the quartzite stone did not qualify as a valuable mineral deposit because the stone could not be marketed at a profit does no violence to the statute. Indeed, the marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is "valuable". It is a logical complement to the "prudent man test" which the Secretary has been using to interpret the mining laws since 1894. Under this "prudent man test" in order to qualify as "valuable mineral deposits" the discovered deposits must be of such a character that "a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success, in developing a valuable mine. . . ." Castle v. Womble, 19 L.D. 455, 457 (1894). This Court has approved the prudent man formulation and interpretation on numerous occasions. See, for example Chrisman v. Miller, 197 U.S. 313, 322; Cameron v. United States, 252 U.S. 459; Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-336. Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for any other purpose.⁴ The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the costs of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact.

³Section 3 of the Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. Sec. 611, provides in pertinent part as follows: "A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining law. . . . 'Common varieties' as used in this Act does not include the deposits of such materials which are valuable because the deposit has special property giving it distinct and special value. . . ."

⁴17 Stat. 92, 30 U.S.C. Sec. 29, provides in pertinent part as follows. "A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person . . . having claimed and located a piece of land for such purposes . . . may file [etc.]" (Emphasis in text)

The marketability test also has the advantage of throwing light on a claimant's intention, a matter which is inextricably bound together with valuableness. For evidence that a mineral deposit is not of economic value and cannot in all likelihood be operated at a profit may well suggest that a claimant seeks the land for other purposes. Indeed, as the Government points out, the facts of this case--the thousands of dollars and hours spent building a home on 720 acres in a highly scenic national forest located two hours from Los Angeles, the lack of an economically feasible market for the stone, and the immense quantities of identical stone found in the area outside the claims--might well be thought to raise a substantial question as to respondent Coleman's real intention.

Finally, we think that the Court of Appeals' objection to the marketability test on the ground that it involves the imposition of a different and more onerous standard on claims for minerals of widespread occurrence than for rarer minerals which have generally been dealt with under the prudent-man test is unwarranted. As we have pointed out above, the prudent-man test and the marketability test are not distinct standards, but are complementary in that the latter is a refinement of the former. While it is true that the marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence, this is accounted for by the perfectly natural reason that precious metals which are in small supply and for which there is a great demand, sell at a price so high as to leave little room to doubt that they can be extracted and marketed at a profit.

We believe that the Secretary of the Interior was also correct in ruling that "in view of the immense quantities of identical stone found in the area outside the claims, the stone must be considered a 'common variety'" and thus falling within the exclusionary language of the 1955 Act, 30 U.S.C. Sec. 611, which declares that "[a] deposit of common varieties of . . . stone . . . shall not be deemed a valuable mineral deposit within the meaning of the mining laws. . . ." Respondents rely on the earlier 1892 Act, 30 U.S.C. Sec. 161, which makes the mining laws applicable to: lands that are chiefly valuable for building stone" and contend that the 1955 Act has no application to building stone, since, according to respondents, "[s] tone which is chiefly valuable as building stone is, by that very fact, not a common variety of stone." This was also the reasoning of the Court of Appeals. But this argument completely fails to take into account the reason why Congress felt compelled to pass the 1955 Act with its modification of the mining laws. The legislative history makes clear that this Act (30 U.S.C. Sec. 611) was intended to remove common types of sand, gravel, and stone from the coverage of the mining laws, under which they served as a basis for claims to land patents, and to place the disposition of such materials under the Materials Act of 1947 (30 U.S.C. Sec. 601), which provides for the sale of such materials without disposing of the land on which they are found. For example, the Chairman of the House Committee on Interior and Insular Affairs explained the 1955 Act as follows:

"The reason we have done this is because sand, stone, gravel . . . are really building materials, and are not the type of materials contemplated to be handled under the mining laws, and that is precisely where we have so much abuse under the mining laws. . . ." 101 Cong. Rec. 8743. (Emphasis in text)

Similarly, the Senate Committee Report stated that the bill was intended to:

"Provide that deposits of common varieties of sand, building stone, gravel, pumice, pumicite, and cinders on the public lands, where they are found in widespread abundance, shall be disposed of under the Materials Act of 1947 (61 Stat. 681), rather than under the mining law of 1872." S. Rep. No. 554, 84th Cong., 1st Sess., p. 2. (Emphasis in text)

Thus we read 30 U.S.C. Sec. 611, passed in 1955, as removing from the coverage of the mining laws "common varieties" of building stone, but leaving 30 U.S.C. Sec. 161, the 1892 Act, entirely effective as to building stone that has "some property giving it distinct and special value" (expressly excluded under Sec. 611).

For these reasons we hold that the United States is entitled to eject respondents from the land and that respondents' counterclaim for a patent must fail. The case is reversed and remanded to the Court of Appeals for the Ninth Circuit for further proceedings to carry out this decision.

It is so ordered.

Mr. Justice Marshall took no part in the consideration or decision of this case.

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APPENDIX B

Interior Department Decision Solicitor's Opinion
69 I.D. 145, Sept. 20, 1962

69 I.D. 145

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

M-36642

September 20, 1962

To: Assistant Secretary, Public Land Management.

Subject: Review of the "Marketability Rule" as applied to the Law of Discovery.

Your memorandum to the Secretary requesting a review of this rule has been referred to this office for reply.

After giving careful consideration to this subject, it is our conclusion that there is no basis for making any change in the test which the Department applies to mining claims in determining whether there has been a valid discovery. However, we believe that, since our decisions may have been misunderstood and an undue rigidity may have been ascribed to them, we should explain the position taken.

The test which we apply, the prudent man test, is based upon the provision of R.S. 2319 (30 U.S.C. sec. 22) that only "valuable mineral deposits, may be located. A valuable mineral deposit, it has been held, is one the discovery of which would justify a man of ordinary prudence in the further expenditure of time and money with a reasonable prospect of success in the effort to develop a paying mine. Castle v. Womble, 19 L.D. 455 (1894); Chrisman v. Miller, 197 U.S. 313 (1905).

The marketability rule about which you have particularly asked our views is merely one aspect of this test. The Department and the courts have, we believe, rightly held that a prudent man would not be justified in developing a mineral deposit if the extracted minerals were not marketable. This marketability test is in reality applied to all minerals, although it is often mistakenly said to be applied solely to nonmetallic minerals of wide occurrence. Many minerals are deemed intrinsically valuable.

An intrinsically valuable mineral by its very nature is deemed marketable, and therefore merely showing the nature of the mineral usually meets the test of marketability. On the other hand, where we are concerned with a nonmetallic mineral found in a great many places, application of the prudent man test requires that a market for the mineral be shown by the locator. The extreme example is probably sand and gravel, which are found in every State. There is a demand for sand and gravel, but in many areas the available deposits far exceed the market. In such cases we must insist that the locator show that there is a market actually existing for his minerals. To validate any sand and gravel claim proof of present marketability must be clearly shown.

Other cases fall between the two extremes of the intrinsically valuable mineral on the one hand and sand and gravel on the other hand. Each case must be judged on its own merits. When a nonmetallic mineral is not of extremely wide occurrence and when a general demand for that mineral exists, it may be enough, instead of showing an actually existing market for the products of a particular mine, to show that a general market for the substance exists of a type which a reasonably prudent man would be justified in regarding as one in which he could dispose of those products.

There are two points which we wish to stress. The first is that the marketability test is only one aspect of the prudent man test, albeit a very important aspect since in the absence of marketability no prudent man would seem justified in the expenditure of time and money. The second is that each case must be judged on its own facts. Too rigid application of rules mistakenly interpreted from departmental decisions could lead to incorrect decisions in the field.

(Sgd) Frank J. Barry,
Solicitor

No. 21697

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORD M. CONVERSE, APPELLANT

v.

STEWART L. UDALL, SECRETARY OF
THE INTERIOR, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF AND APPENDIX FOR THE APPELLEE

EDWIN L. WEISL, JR.,
Assistant Attorney General.

SIDNEY I. LEZAK,
United States Attorney,
Portland, Oregon, 97207.

JACK G. COLLINS,
Assistant United States Attorney,
Portland, Oregon, 97207.

ROGER P. MARQUIS,
GEORGE R. HYDE,
Attorneys, Department of Justice,
Washington, D. C., 20530.

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OPINION BELOW

The opinion of the district court is contained in
the record at pages 29-49.

JURISDICTION

Jurisdiction of the district court is alleged to
be based upon the Administrative Procedure Act, the Declaratory
Judgment Act, the existence of a federal question and the in-
herent power of the court to grant injunctive relief. Appellee
does not believe that jurisdiction of the district court over

the Secretary of the Interior can be based upon any of the above grounds. Jurisdiction is also stated to be based on the Act of October 5, 1962, 76 Stat. 744, 28 U.S.C. secs. 1361, 1391, which authorizes actions in the nature of mandamus to compel an officer or employee of the United States to perform a ministerial duty. Appellee agrees that 28 U.S.C. sec. 1361 gives the district court a limited jurisdiction over the Secretary of the Interior and that venue is based on 28 U.S.C. sec. 1391(e). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

Administrative proceedings culminating in a decision of the Secretary of the Interior held that the Act of 1955, providing for federal management of the surface of mining claims, applied to appellant's claims. The questions presented are:

1. Whether there are any procedural errors in the administrative proceedings which would require reversal and new proceedings.
2. Whether the district court erred in finding that appellant's charges of bias on the part of the hearing examiner were groundless.

3. Whether the district court erred in finding that the decision of the Secretary of the Interior was supported by substantial evidence.

STATUTE AND REGULATION INVOLVED

Section 4 of the Act of July 23, 1955, 69 Stat. 367, 368-369, 30 U.S.C. secs. 612(a), 612(b), provides in pertinent part:

- (a) Prospecting, mining or processing operations.

Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.

- (b) Reservations in the United States to use of the surface and surface resources.

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use

so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: Provided further, That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: Provided further, That nothing in sections 601, 603, and 611-615 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

* * * * *

Section 5 of the Act of July 23, 1955, 69 Stat. 367, 369-371, 30 U.S.C. secs. 613(a), 613(c), 613(e), provides in pertinent part:

- (a) Notice to mining claimants; request; publication; service.

The head of a Federal department or agency which has the responsibility for administering surface resources of any lands belonging to the United States may file as to such lands in the office of the Secretary of the Interior, or in such office as the Secretary of the Interior may designate, a request for publication of notice to mining claimants, for determination of surface rights, which request shall contain a description of the lands covered thereby, showing the section or sections of the public land surveys which embrace the lands covered by such request, or if such lands are unsurveyed, either the section or sections which would probably embrace such lands when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument.

The filing of such request for publication shall be accompanied by an affidavit or affidavits of a person or persons over twenty-one years of age setting forth that the affiant or affiants have examined the lands involved in a reasonable effort to ascertain whether any person or persons were in actual possession of or engaged in the working of such lands or any part thereof, and, if no person or persons were found to be in actual possession of or engaged in the working of said lands or any part thereof on the date of such examination, setting forth such fact, or, if any person or persons were so found to be in actual possession or engaged in such working on the date of such examination, setting forth the name and address of each such person, unless affiant shall have been unable through reasonable inquiry to obtain information as to the name and address of any such person, in which event the affidavit shall set forth fully the nature and results of such inquiry.

The filing of such request for publication shall also be accompanied by the certificate of a title or abstract company, or of a title abstractor, or of an attorney, based upon such company's abstractor's, or attorney's examination of those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in said request, setting forth the name of any person disclosed by said instruments to have an interest in said lands under any unpatented mining claim heretofore located, together with the address of such person if such address is disclosed by such instruments of record. "Tract indexes" as used herein shall mean those indexes, if any, as to surveyed lands identifying instruments as affecting a particular legal subdivision of the public land surveys, and as to unsurveyed lands identifying instruments as affecting a particular probable legal subdivision according to a projected extension of the public land surveys.

Thereupon the Secretary of the Interior, at the expense of the requesting department or agency, shall cause notice to mining claimants to be published in a newspaper having general circulation in the county in which the lands involved are situate.

Such notice shall describe the lands covered by such request, as provided heretofore, and shall notify whomever it may concern that if any person claiming or asserting under, or by virtue of, any unpatented mining claim heretofore located, rights as to such lands or any part thereof, shall fail to file in the office where such request for publication was filed (which office shall be specified in such notice) and within one hundred and fifty days from the date of the first publication of such notice (which date shall be specified in such notice), a verified statement which shall set forth, as to such unpatented mining claim--

- (1) the date of location;
- (2) the book and page of recordation of the notice or certificate of location;
- (3) the section or sections of the public land surveys which embrace such mining claims; or if such lands are unsurveyed, either the section or sections which would probably embrace such mining claim when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument;
- (4) whether such claimant is a locator or purchaser under such location; and
- (5) the name and address of such claimant and names and addresses so far as known to the claimant of any other person or persons claiming any interest or interests in or under such unpatented mining claim;

such failure shall be conclusively deemed (i) to constitute a waiver and relinquishment by such mining claimant of any right, title, or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and (ii) to constitute a consent by such mining claimant that such mining claim, prior to issuance of patent therefor, shall be subject to the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and (iii) to preclude thereafter, prior to

issuance of patent, any assertion by such mining claimant of any right or title to or interest in or under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims.

If such notice is published in a daily paper, it shall be published in the Wednesday issue for nine consecutive weeks, or, if in a weekly paper, in nine consecutive issues, or if in a semiweekly or triweekly paper, in the issue of the same day of each week for nine consecutive weeks.

Within fifteen days after the date of first publication of such notice, the department or agency requesting such publication (1) shall cause a copy of such notice to be personally delivered to or to be mailed by registered mail or by certified mail addressed to each person in possession or engaged in the working of the land whose name and address is shown by an affidavit filed as aforesaid, and to each person who may have filed, as to any lands described in said notice, a request for notices, as provided in subsection (d) of this section, and shall cause a copy of such notice to be mailed by registered mail or by certified mail to each person whose name and address is set forth in the title or abstract company's or title abstractor's or attorney's certificate filed as aforesaid, as having an interest in the lands described in said notice under any unpatented mining claim heretofore located, such notice to be directed to such persons address as set forth in such certificate; and (2) shall file in the office where said request for publication was filed an affidavit showing that copies have been so delivered or mailed.

(c) Hearings.

If any verified statement shall be filed by a mining claimant as provided in subsection (a) of this section, then the Secretary of Interior shall fix a time and place for a hearing to determine the validity and effectiveness of any right or title to, or interest in or under such mining claim, which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, which place of hearing shall be in the county where the lands in question or parts thereof are located, unless the mining claimant agrees otherwise. Where verified statements are filed asserting rights to an aggregate of more than twenty mining claims, any single hearing shall be limited to a maximum of twenty mining claims unless the parties affected shall otherwise stipulate and as many separate hearing 1/ shall be set as shall be necessary to comply with this provision. The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States. If, pursuant to such a hearing the final decision rendered in the matter shall affirm the validity and effectiveness of any mining claimant's so asserted right or interest under the mining claim, then no subsequent proceedings under this section shall have any force or effect

1/ So in original. Probably should be "hearings".

upon the so-affirmed right or interest of such mining claimant under such mining claim. If at any time prior to a hearing the department or agency requesting publication of notice and any person filing a verified statement pursuant to such notice shall so stipulate, then to the extent so stipulated, but only to such extent, no hearing shall be held with respect to rights asserted under that verified statement, and to the extent defined by the stipulation the rights asserted under that verified statement shall be deemed to be unaffected by that particular published notice.

* * * * *

(e) Failure to deliver or mail copy of notice.

If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person or as to the rights asserted by that person and the failure of that person to file a verified statement, as provided in such notice, shall in no manner affect, diminish, prejudice or bar any rights of that person.

43 C.F.R. sec. 1852.3-2 provides:

The examiner shall fix a place and date for the hearing and notify all parties and the Bureau at least 30 days in advance of the date set, unless the parties and the Bureau request or consent to an earlier date. The notice shall

include (a) the time, place, and nature of the hearing, (b) the legal authority and jurisdiction under which the hearing is to be held, and (c) the matters of fact and law asserted.

STATEMENT

On December 6, 1965, appellant instituted this action ^{1/} seeking to overturn a decision of the Secretary of the Interior. The decision of the Secretary of the Interior was issued after detailed review of the facts and testimony in the record of this case and after consideration of the same arguments which are being presented to this Court. The Secretary, in affirming the decision of the Director of the Bureau of Land Management, which had affirmed the decision of the Hearing Examiner, held that the appellant's two unpatented mining claims were subject to the restrictions and reservations in Section 4 of the Surface Resources Act of July 23, 1955, 69 Stat. 367, 30 U.S.C. sec. 613. The basic issue to be determined in the agency proceedings was whether or not a valuable deposit of minerals had been discovered on either of the appellant's

^{1/} We use the term "Secretary," although the decision was by a subordinate acting under delegated authority.

two unpatented mining claims prior to July 23, 1955, the effective date of the Surface Resources Act. If the requirements of a discovery under the mining laws had been met prior to that date, then the provisions of the Surface Resources Act would not apply. The Act, in general, provided that any mining claims located after July 23, 1955, would be subject to the right of the United States to manage and dispose of surface resources other than mineral deposits. The purpose of this Act was to limit the use or misuse of surface resources by mining claimants prior to the issuance of a patent. In this case, it has been stipulated that the value of the timber on these two unpatented mining claims was \$91,038.61 (R. 32). The validity of the appellant's two mining claims was not in issue in this proceeding (R. 48). Nor is the right to timber, as such, since the mining claimant, prior to patent, can use timber only to promote his mining operations (see United States v. Etcheverry, 230 F.2d 193 (C.A. 10, 1956), and cases there cited), and the Surface Resources Act recognizes this right, subject to management programs.

The Surface Resources Act, supra, provides a detailed procedure for determining whether the United States is to have the right to manage surface resources of unpatented mining claims which were located prior to the passage of that Act. In accord with the provisions of that Act, a request was made, by the Chief of the Forest Service acting on behalf of the Secretary of Agriculture, that a determination be made as to who had the right to manage the surface resources of the appellant's two mining claims (R. 233). As required by the statute, it was requested that public notice also be given to mining claimants. Publication, as required, was made (R. 241-242). Notice was also mailed to mining claimants who had been in various ways identified (R. 240). Also filed with the request for determination were the required certificate of examination (R. 235) and a certificate of nonexistence of tract indexes (R. 238).

Appellant, on July 26, 1961, in response to these notices, filed a verified statement. Upon the filing of this verified statement, it became the duty of the Secretary, in compliance with 30 U.S.C. sec. 613(c), to fix the time and

place for a hearing to determine the validity of the mining claims to which the claimant asserted rights contrary to the limitations and restrictions of 30 U.S.C. sec. 612. The Act provides in part, 30 U.S.C. sec. 613(c), that:

The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States. [Emphasis supplied.]

As required under the regulations of the Department, 43 C.F.R. sec. 1852.3-2 (*supra*, pp.10-11), notice was given to the appellant, by the hearing examiner, of the time and place and nature of the hearing, the legal authority and jurisdiction under which the hearing was to be held and the matters of fact and law asserted.

A hearing before an examiner was held at Portland, Oregon, on June 11, 1962. At the outset of the hearing the mining claimant filed a motion to change the hearing examiner and filed an affidavit in support of that motion charging bias and prejudice. The motion was denied by the examiner as not having been timely filed as required by 5 U.S.C. sec. 1006(a)

(R. 37). The examiner stated "* * * I think, if you had filed it ten days ago I could have had a different Hearing Examiner at the hearing." (R. 186.)

The sole issue at the hearing was whether or not a valuable deposit of minerals had been discovered on either of the two claims prior to July 23, 1955. The hearing examiner did not attempt to determine whether or not a discovery had been made since that date, although much of the testimony produced at the hearing pertained to evidence of mineralization uncovered since that date (R. 17).

The district court, in its opinion, has carefully stated the proceedings which this case has gone through up to this present appeal. Rather than rephrasing this material, we adopt its recital of the facts, omitting only the irrelevant materials (R. 31-32):

* * * From the evidence adduced at the hearing, Hearing Examiner Holt concluded that the most favorable finding which could be made for the mining claimant was that there was sufficient evidence of mineralization to induce a prudent man to retain the claims until a road had been constructed and until more extensive exploration had been completed, but that there was

not sufficient evidence of mineralization, as of July 23, 1955, to induce a prudent man to expend labor and means on either the Paymaster or Edith Lode claims with a reasonable expectation of developing a valuable mine. As a result, these two mining claims were held not to have been validated prior to passage of the Surface Resources Act, and were found to be subject to the limitations and restrictions of that Act.

This determination did not directly affect the mining claims themselves. The mining claimant still had the right to use the claims for mining purposes, and for any other purpose incidental to mining. The adverse determination to mining claimant Converse only precluded him from using the surface resources (including the timber of the claims, which the parties stipulated to have a value of \$91,038.61) in a manner not incidental to mining, and made the claims subject to the right of the government to manage the surface resources, until a patent was obtained.

Following administrative regulations, claimant Converse appealed the decision of Hearing Examiner Holt to the Director of the Bureau of Land Management. He contended in substance that: a fair hearing was impossible because the examiner was prejudiced and had prejudged the case; he was entitled to a jury trial, and the administrative hearing was a deprivation of property without due process of law; the government had failed to establish a prima facie case, and he had affirmatively showed that a discovery had been made on each of the claims; the hearing examiner erred in holding that assays or ore

samples taken by the mining claimant after July 23, 1955, were inadmissible, while those taken by the contestant after the same date were admissible; and, the government's witnesses did not fairly sample portions of the claims alleged to have been opened prior to 1955.

On October 8, 1963, the Assistant Director, Bureau of Land Management, affirmed the decision of Hearing Examiner Holt. Claimant Converse then appealed to the Secretary of the Interior, reiterating essentially the same arguments that were contained in his appeal to the Director of the Bureau of Land Management, and adding the contentions that the Director erred in holding that "exploration and development," as used in mining laws are not synonymous, and that the Director either ignored or refused to accept the facts found by the hearing examiner. On March 26, 1965, the decision of the Assistant Director was affirmed by Ernest F. Hom, Assistant Solicitor of the Interior, pursuant to authority delegated by the Secretary of the Interior.

The mining claimant thereafter instituted this action in the district court, seeking the dismissal of the proceeding or that the matter be remanded to the Secretary for a new trial (R. 3-4). Both parties to this proceeding filed briefs and moved for summary judgment based upon the record in the administrative proceedings.

The district court, in its opinion, fully considered the numerous contentions of the appellant which are raised on this appeal (R. 37-46). The charges of bias, procedural defects, lack of due process and refusal to change hearing examiners are discussed and answered by the court in considerable detail. The district court concluded (R. 45-46)

Upon a review of the entire records of the two proceedings in question here, it is my finding that there is substantial evidence to support the Secretary's decision.

The district court went on to hold (R. 48):

Of course, this affirmance in no way affects the validity of the mining claims as such. Plaintiffs retain the right to work their claims for mining purposes, and for all purposes incidental to mining. This affirmance only precludes the plaintiffs from using the surface resources of the claims in a manner which is not incidental to mining, until a patent is obtained. In other words, the claims remain subject to the right of the government to manage the surface resources, when not interferring [sic] with the mining.

The Secretary had previously said almost the same thing when he held (R. 28):

If the appellant is convinced that he has satisfied the requirements of a discovery, he may, of course, apply for a patent to the claims. If, on the other hand, he does not wish to risk the possibility of an adverse ruling on that question, this decision does not bar further effort on his part to explore and develop the mineral deposits which may be found within the limits of the claims and then, upon making a discovery, apply for a patent.

From the court's granting of the Secretary's motion for summary judgment, dated September 14, 1966 (R. 50), the appellant filed a motion for a new trial (R. 51), which was denied by order dated November 30, 1966 (R. 89, 91-92). From this final order, the appellant filed his appeal dated January 27, 1967 (R. 93).

SUMMARY OF ARGUMENT

I

The proceedings instituted to determine who shall manage the surface resources of the public domain upon which appellant has unpatented mining claims fully complied with the provisions of the Surface Resources Act. All procedural requirements have been satisfied. In any event, even if appellant's arguments had merit, no substantive rights of appellant are affected and nothing would be gained by remanding this for a rehearing.

Appellant is in no position to challenge the service of notice of these proceedings, since he responded to the notice and appeared at the agency proceedings. In fact, personal service was made.

The appellee fully complied with the outlined procedure for instituting the agency proceedings.

There is nothing improper in the hearing examiner's refusing to accept a detailed offer of proof of obviously irrelevant testimony.

II

The charges that the hearing examiner was biased are groundless. The procedure of notifying appellant of the matters of fact and law asserted complied with the departmental regulations. It is nonsense to suggest that, by notifying the appellant of the proceeding instituted by the Fore Service, the hearing examiner has become a prosecutor. The record shows that the district court properly found that the denial of appellant's motion for a change of hearing examiner was proper as not being timely made.

III

The decision of the Secretary is supported by substantial evidence. It is not the function of this Court to weigh the evidence. Upon a review of the entire administrative proceeding, if there is found substantial evidence to support the Secretary's decision, it must be affirmed.

The district court, after a thorough review of the record, has concluded that the decision of the Secretary is based on substantial evidence. The disposition of this case by summary judgment was proper and correct in all respects.

ARGUMENT

I

THE PROCEDURE FOLLOWED IN DETERMINING
WHO IS ENTITLED TO MANAGE THE
SURFACE RESOURCES OF THE APPELLANT'S
UNPATENTED MINING CLAIMS FULLY COMPLIED
WITH THE PROVISIONS OF 30 U.S.C. SEC. 613

Prior to showing the lack of merit in appellant's objections to the administrative procedure, we note that, even if valid, none of them would affect any substantial right of appellant, nor would they alter the evidence or the basis of the departmental decisions. They cannot, we submit, justify reversal and a complete, new administrative proceeding.

The Surface Resources Act, in parts (a) to (e), 30 U.S.C. sec. 613, contains detailed provisions for the institution of proceedings to determine whether a valid discovery had been made on mining claims which had been located prior to passage of that Act. As set forth in the Statement of this brief, each step required by the subject Act was fully complied with. The district court, in its opinion (R. 42-44) fully considered and answered appellant's argument that the procedural requirement of the Surface Resources Act had not been fully met. The delegated representative of the Secretary of Agriculture instituted this proceeding (R. 233); the area of land involved was described by a public land survey description (R. 235); there was a request made for publication (R. 233); there was publication (R. 241-242); there was filed the required affidavit of examination (R. 235-237); and there was also filed a certificate of nonexistence of tract indexes (R. 238). The fact of the appellant being completely informed is verified by the fact of his having answered the notice of publication by the filing of his verified statements (R. 44). As the district court held "They are in no position to questi

the service" (R. 44). The argument made by appellant (Br. 38-40), that there must be personal service if the proceedings are to be regular and have any effect, is simply a play on words, since there was notice given and received, followed by appearance.

The record shows that the district court did find that "A copy of the publication was not served on the mining claimant as demanded by the statute" (R. 43-44). The court went on to find that the appellant was completely informed of the notice of publication and answered it by filing his verified statement. The court did not need to go this far to find that appellant had been advised of the publication of the notice. The record that is before this Court, evidently overlooked by the district court in the maze of arguments presented by the appellant, shows that, in fact, service of the published notice was made. The affidavit of service is in the record at page 240, and the list of addresses mailed to (R. 236) shows that notice was, in fact, mailed to the appellant.

It is argued by appellant, that the Government did not follow the rules of practice of the Department in respect

to the institution of contests or protests (Br. 34). Appella argues that a complaint must still be filed in order to institute a contest. The district court held (R. 44): "The use of a complaint is averted by the publication requirements of the statute."

It is clear from a reading of the Act that proceedings to ascertain who is to manage the surface resources of mining claims are to be instituted in accord with the detailed procedure set forth in the Act. The Act provides, after stating how the proceedings are to be instituted, that "The procedure with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States." 30 U.S.C. sec. 613(c).

This provision of the Act relates not to institution of proceedings, as appellant would have it, but rather to conduct of proceedings instituted in the manner Congress provides in the earlier sections. Appellant's argument produced the absurd result that, despite all those provisions, a formal

complaint must also be filed and served. Neither the language of the statute nor good sense can justify such a result.

Appellant also argues (Br. 40) that there has been failure to comply with the requirement that a certificate of title accompany the request for publication. The district court held that there could not be compliance, due to the fact there were no tract indexes of the lands in question. The court stated "Obviously, compliance was impossible and the point does not go to the merits" (R. 43). The reason for this requirement was to ascertain the parties claiming interests in the mining claims, so that they could be notified of the pending proceedings. Notice here has been given and received, hence the court's finding that the supposed defect did not go to the merits. The certificate of nonexistence of tract indexes (R. 238) is said to be contradicted by the affidavit of service (R. 240). This affidavit is not at all inconsistent with the certificate of nonexistence of tract indexes. The affidavit of service states that notice was mailed to persons in three different categories. Appellant falls in category No. 1. In this instance, apparently no persons would be covered by category No. 3. Obviously, the paragraph (which has no

application here), which is said to be inconsistent, is but a part of a form letter. The only possible objection to paragraph No. 3 would be that it was not stricken from the form letter. This is but a nit pick of no consequence. It should also be noted that appellant has not challenged the truth of the Government's certificate of nonexistence of tract indexes.

The appellant also argues (Br. 54) that the hearing examiner erred in refusing to admit into evidence certain testimony or to permit offers of proof to be made of certain testimony. The district court considered the appellant's arguments and stated (R. 45):

The issue is not whether there was a discovery at the date of the hearing, but whether a discovery was made upon the claims in question prior to the passage of the Surface Resources Act. To demonstrate a discovery prior to July 23, 1955, required samples of mineral from portions of the claims exposed prior to that date. Plaintiffs' evidence of mineral deposits exposed at a later date was not material. The government's samples were taken from areas which were exposed on or before the date of the Act.

The appellant's complaint about restrictions upon the presentation of his case represents simply his refusal to confine his testimony to the relevant issue, which was the existence of a valid discovery prior to July 23, 1955. Appellant, in his brief

pp. 56-57), quotes the transcript of the proceedings before the hearing examiner as an example of the hearing examiner denying an offer of proof. Very clearly, that quoted extract shows one of the reasons for the rejection of the offer of proof to be that the testimony offered related to a period subsequent to July 23, 1955. There can be no possible prejudice in the refusal of a hearing examiner to permit the introduction into the record of obviously irrelevant testimony which has no bearing on the question to be decided. Certainly, he is not required to clutter the record with offers of proof showing the details of irrelevant matters.

II

THERE IS NOTHING IN THE RECORD WHICH SUPPORTS THE APPELLANT'S CHARGE THAT THE HEARING EXAMINER WAS BIASED

Appellant argues that, because the hearing examiner signed the notice of hearing, he is both prosecutor and judge and thereby violates the principle that one who is engaged in prosecuting function shall not judge. The Surface Resources Act provides in pertinent part (30 U.S.C. sec. 613(c)):

* * * notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States.

The Department's regulations dealing with this subject are contained in 43 C.F.R. part 1850. Particular attention is directed to sec. 1852.3-2, supra. It is expressly provided by this section that the examiner will give a notice which shall contain among other things, "the matters of fact and law asserted." This, the examiner has done, and for this act of informing the appellant of what the issues to be heard at a hearing are, he is charged as being engaged in a prosecutor function. This charge is patently ridiculous. It produces an absurdity. Appellant would require (again a pure formality) having some other government employee give notice of the hearing examiner's schedule of cases.

The district court, in considering this argument, had this to say (R. 40-41):

Plaintiffs' argument that Holt, by signing the notice of hearing, was combining the functions of a prosecutor and a judge, thus violating both the Administrative Procedure Act and due process, is completely specious. These notices

of hearing did nothing more than notify the plaintiffs of the issues to be dealt with at the subsequent proceedings. The fact that Holt signed such documents, and later presided at the hearing, is no more a violation of due process than the pre-trial orders federal judges sign every day. Moreover, plaintiffs' contention is based on the premise that the hearing examiner brought the charge against these claims, but the simple fact is that he did not. The Forest Service initiated the charges, and this is made clear by the notice of hearing. Thus, Holt merely informed the plaintiff of the charges which were brought by the agency. Even if he had instituted the proceedings, this would not have violated the Administrative Procedure Act:

The appellant has also charged (Br. 62) the examiner with bias as a matter of fact. The district court fully considered this charge in its opinion (R. 37-42). It stated (R. 39):

* * * Plaintiffs, in my opinion, have fallen far short of meeting this test and, conversely, the record indicates that their hearings were conducted fairly and impartially by Hearing Examiner Holt.

* * * * *

The allegations in the affidavits that the examiner had never decided a case of this type in favor of mining claimants, are belied by the record which contains copies of findings prepared by the examiner in which he decided wholly or partially in favor of mining claimants in cases involving Oregon land. But, even if we were to assume that

Holt was predisposed in favor of the government in such actions, the fact remains that the bias has to be personal in order for them to prevail. [Footnote quoting Marquette Cement Mfg. Co. v. Federal Trade Commission, 147 F.2d 589, 592 (C.A. 7, 1945), omitted.]

An examination of the record shows, as the district court found, that the hearing examiner "was most solicitous of their [appellant's] feelings at the hearing * * *. In short, he [the examiner], throughout both hearings, went out of his way to accomodate [sic] plaintiffs" (R. 40).

Another example of the objectivity and solicitous attitude of the examiner is his statement that "* * * I think if you had filed it ten days ago I could have had a different Hearing Examiner at the hearing" (R. 186). This statement was made by the examiner after denying the appellant's motion for a change of examiners. The court below has found that there was a substantial basis in the administrative record for denying the motion as not being timely and sufficient (R. 41). The court went on to state (R. 42):

The record anchors a finding that plaintiff knew for some time that Holt was to hear the case. Furthermore, to permit a mining claimant to delay hearings by waiting until

the commencement of a hearing to ask for a change of hearing examiner, where as here it was necessary for the hearing examiner to travel several hundred miles to be present at a hearing, would frustrate the administrative process.

III

THE SECRETARY'S DECISION IS BASED UPON SUBSTANTIAL EVIDENCE

This Court, in Henrikson v. Udall, 350 F.2d 949, 950

965) held:

It is the function of neither this Court nor of the District Court, in a proceeding such as this, to weigh the evidence adduced in the administrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed.

e also Foster v. Seaton, 271 F.2d 836, 838-839 (C.A. D.C. 1959).

The district court stated (R. 45-46):

Upon a review of the entire records of the two proceedings in question here, it is my finding that there is substantial evidence to support the Secretary's decision.

The court went on to hold (R. 46-47):

When the government contests a mining claim, it bears the burden of going forward with sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show, by a preponderance of the evidence, that his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). 68 I.D. 235, 238 (1961).

From an examination of the entire record, I find that the government did sustain its burden of proof. Manifestly, the testimony of the government witnesses was sufficient to create a prima facie case in favor of the government's position. Their examination of the claims and their analysis of the mineral samples taken therefrom failed to disclose a discovery of a valuable mineral deposit on any one or more of the claims.

It is now settled beyond question that the issue of whether there has been a valid discovery of minerals is a question of fact. Furthermore, it is indicated that the decision of the Secretary on that issue is conclusive, in the absence of fraud or imposition. Cameron v. United States, 252 U.S. 450 (1920). Whether the decisions of the Secretary of the Interior in this case are conclusive, I need not decide. Certainly, there is not evidence of fraudulent, capricious or arbitrary action on the part of the Interior Department, unless it could be said that the action of the hearing examiner in failing to step aside could be viewed in that light. Already, I have decided adversely to the plaintiffs on this issue. Again, I repeat that the finding that a discovery of a valuable mineral deposit was not made on any one or more of the claims prior to July 23, 1955, is supported by substantial evidence and must not be disturbed.

To be kept in mind is the fact that most of the higher quality samples of minerals, on which plaintiffs rely, were taken from cuts exposed after the effective date of the Act.

Whether valid discovery has been made is a question of fact, the decision of which by the Secretary of the Interior, based on substantial evidence, is conclusive, in the absence of fraud or imposition, and none is claimed in this case. Cameron v. United States, 252 U.S. 450, 459-461 (1920); Boesche v. Udall, 373 U.S. 472, 476-477 (1963); Best v. Humboldt Mining Co., 371 U.S. 334, 335-336 (1963). Even though a court in a trial de novo might have arrived at a different result, it may not substitute its judgment for that of the administrative agency expert in its field.

The decision of the Secretary of the Interior explains in considerable detail why the examiner found that no discovery had been made as of July 23, 1955, on appellant's mining claims.

In order to reduce the size of this brief, we have not duplicated the Secretary's comprehensive review of the facts and evidence that is the basis of his decision. This material is contained in the Secretary's decision (R. 17-28)

and treats in detail the conflicts in the testimony. The district judge stated (R. 47-48): "I find myself in full agreement with the summarization by the Secretary in his decision." We submit that the evidence upon which the Secretary's decision was based, as shown by his decision, is substantial and fully supports his decision.

The only function of the court below with regard to the facts of this case was to determine whether the administrative findings of fact are supported by substantial evidence in the administrative record as a whole. The judicial determination of whether findings of fact are supported by substantial evidence presents only an issue of law. Since the Secretary's decision, as shown by his comprehensive treatment of the facts, is based on substantial evidence, and cross-motions for summary judgment were filed, the court's disposition of this by summary judgment was proper and correct in all respects.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

EDWIN L. WEISL, JR.,
Assistant Attorney General.

SIDNEY I. LEZAK,
United States Attorney,
Portland, Oregon, 97207.

JACK G. COLLINS,
Assistant United States Attorney,
Portland, Oregon, 97207.

ROGER P. MARQUIS,
GEORGE R. HYDE,
Attorneys, Department of Justice,
Washington, D. C., 20530.

JUNE 1967

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE R. HYDE
Attorney, Department of Justice
Washington, D. C., 20530

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

FORD M. CONVERSE,)	
)	
Plaintiff,)	
)	
v.	)	CIVIL NO. 65-581
)	
STEWART L. UDALL, Secretary)	
of the Interior,)	
	)	FILED NOV 30 1966
Defendant.)	
)	
INDEPENDENT QUICK SILVER CO.,)	
an Oregon corporation,)	
)	
Plaintiff,)	
)	
v.	)	CIVIL NO. 65-590
)	
STEWART L. UDALL, Secretary)	
of the Interior,	)	ORDER
)	
Defendant.)	

This cause is before the Court on plaintiffs' motion for a new trial on the Court's previous decision of September 14, 1966.

Independent Quick Silver again challenges the Government's method of sampling each of the twenty-two claims involved, it being claimed that there was a failure to prove a prima facie case by substantial evidence. It is urged that

the six samples of ore taken by the contestant all came from one of the twenty-two claims in controversy, viz: the Lost Mine Claim.

The evidence is contrary to the plaintiff's contentions. The Forest Service Examiners spent three days examining the claim and, in fact, examined all of the places shown to them by the plaintiff's representatives and took samples of all of the cuts that were open. Plaintiff is not in a position to now urge that all of the samples came from one claim when it was its own representatives who directed the Forest Service Examiners to where to obtain the samples. If, as here, a close scrutiny of the surface indicated that no cuts had been opened other than examined, then it seems rather clear that a mineral discovery had not been made.

Plaintiff again urges that the Assistant Solicitor of the Interior committed error in holding that certain testimony and reports were hearsay. The Solicitor stated, in passing, that much of the evidence was general in nature and that much of it probably, especially specific information, was hearsay where there was no opportunity for cross-examination.

Although the Solicitor might have disregarded some of the Hogg statements and the assays compiled by the geologist Westman, the fact remains that the Assistant Solicitor accepted all of this testimony and these records, but found that the evidence lacked specificity and showed only that further exploration was recommended. Plaintiff's real complaint is that the Solicitor did not give more weight to this evidence, rather than excluding it under the hearsay rule.

It is next urged that if the decision of September 14th is allowed to stand that the Court would be approving an administrative decision that the discovery of a body of ore containing 18,600 tons, with an average of 5.2 pounds of mercury per ton, would not be a discovery within the meaning of the mining law. There is nothing in the decision of the Assistant Solicitor, nor, for that matter, in any part of the record, which supports this argument. The Solicitor merely held that the plaintiff did not sufficiently prove that such a body of ore existed. In other words, the Solicitor resolved the issue of fact against the plaintiff.

I find nothing in the arguments of Quicksilver which would cause me to, in any way, modify my original opinion.

In the Converse case, it is argued that the original decision departs from the well settled rule of discovery and makes discovery depend on the name applied to the additional work which a reasonably prudent person would be justified in expending in both money and effort. It is argued that the Assistant Solicitor has altered the long-standing policy of the Department and now recognizes a distinction between the terms "discovery", "development" and "exploration". The record leaves little doubt that the Department has long recognized a sharp distinction between "exploration" and "development" in connection with whether a "discovery" has been made. For example, if one has found only enough mineral to justify further "exploration", as yet he has not made a "discovery", but if he has found enough mineral to justify a "development", then a "discovery" has been made. The opinion of the Assistant Solicitor is given complete support by United States v. Altman, et al, 68 I.D. 235, 237-8 (1961), from which I quote:

"There is, of course, a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found it is

often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are found of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made."

Additional support is added to the opinion of the Assistant Solicitor by United States v. Edgecumb Exploration Co., Inc., A-29908 (May 25, 1964).

Plaintiff fails to recognize that once the Government has established a prima facie case, the burden shifts to the claimant to show by a preponderance of the evidence that his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

The motion for a new trial in each case is denied.

IT IS SO ORDERED.

DATED this 30th day of November, 1966.

s/ John F. Kilkenny
District Judge

No. 21697

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FORD M. CONVERSE, APPELLANT,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PETITION FOR REHEARING FOR THE APPELLANT

FILED

SEP 20 1968

William Braly Murray
Attorney for Appellant
525 Failing Building
Portland, Oregon 97204

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21697

FORD M. CONVERSE, APPELLANT,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

APPELLEE,

PETITION FOR REHEARING FOR THE APPELLANT

TO THE HONORABLE KOELSCH AND DUNIWAY, CIRCUIT JUDGES, AND PREGERSON, DISTRICT JUDGE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Converse respectfully petitions for rehearing to clarify and correct the
decision of August 19, 1968.

Without compliance with the statutes upon which their jurisdiction was made to
depend, the Forest Service had no jurisdiction to initiate and the Department of the
Interior had no jurisdiction to prosecute Converse. Should this Court disregard
safeguards enacted to limit agency jurisdiction and power in prosecutions under
30 U.S.C. 613? Administrative jurisdiction and power cannot be created or enlarged
by the courts in the proper exercise of their judicial functions. Federal Trade
Commission v. Raladam Co., 283 U.S. 643, 51 S.Ct. 587. To do so would deny "Due
Process of Law" under the Fifth Amendment to the Constitution of the United States

Constitutional "Due Process" with respect to the exercise of agency jurisdiction
and power is implemented in our case here by statute, 30 U.S.C. 613, the
Administrative Procedure Act, which prohibits process except in the manner autho-
rized by law, 5 U.S.C. 1005(b) 1008(a), and Agency Regulations 43 CFR 221, Sub-
sections 54, 63 and 68. Do the procedural provisions of these statutes and these

The District Court found, as a matter of fact, agency noncompliance with conditions upon which agency jurisdiction is made to depend under 30 U.S.C. 613, i.e. (a) "No request for publication was accompanied by the required certificate of title or abstract of title;" R43 (b) "A copy of the publication was not served on the mining claimant as demanded by Statute;" R 43 (c) No agency complaint apprized Converse of the charges brought against him.

We are not unaware of Executive Power to take over all mines at will should he conclude that there is an economic or financial crisis for lack of gold or lack of silver or lack of other metals. Executive Order No. 10997 and No. 11051. But until the Executive does so, the Secretary should be required to comply with mandatory statutes upon which his jurisdiction and authority depend.

"Due Process" was denied Converse. Requests for leave to make offers of proof under the rule as to Walcott (Tr 174), Converse (Tr 24, 25), Suchy (Tr 58-61) and Persons (Tr 143, 148), were denied by the Hearing Examiner. Exceptions to the rulings of the Hearing Examiner were taken. (Tr 148-150).

Mr. Murray: "It's tantamount to a denial of due process to refuse to permit a Mining Claimant in a proceeding of this kind the right to introduce his evidence. Certainly, it might be objectionable evidence in the view of the Examiner, but, in the view of a reviewing body on appeal, it might be deemed proper evidence. But to prohibit the Mining Claimant from making his record, certainly, is a denial of due process."

It was the duty of Converse to obey the rulings of the Hearing Examiner and refrain from stating in the record what he proposed to prove. His remedy was to appeal.

In Downie v. Powers et al, 193 F 2d 760 (10th Cir. 1951), it was held that the spirit of the mandate of the Rule 43(c), 28 USCA, permitting offers of proof of excluded testimony to be made for the record cannot be ignored. The purpose

of the rule permitting the examining attorney to make a specific offer of what he expects to prove by the witness' answer to an excluded question is to enable the examining attorney to make such a record that an Appellate Court can determine whether there was reversible error in excluding the question. See Moore's Federal Practice, Vol. 3, p. 3076.

In Pennsylvania Lumberman's Mutual Fire Insurance Co. v. Nicholas, 253 Fed 504, the Court said:

"Appellants also complain of the refusal of the trial court to permit them to prove or even make their proffer of proof as to certain of their other defenses. Of course, any evidence they wish to tender that would tend to establish their defenses should be received by the Court, and as to any which the Court considers irrelevant, immaterial or otherwise improper, the parties must be given ample opportunity to put in the record a fair statement so that the Appellate Courts can intelligently pass upon the challenged rulings of the Court."

The Court may wish to correct what appears to be unwarranted agency assumptions before finally fixing its stamp of approval to them. The statement that "Converse still has his claims, can work them and apply for patent" is based on the erroneous assumption that the lands could not be withdrawn from mineral entry. The Secretary can withdraw them from entry anytime he wishes unless there has been a valid mineral discovery. Indeed, it is unrealistic to assume that any citizen would risk capital subject to loss at the whim of the Secretary.

In applying tests for discovery the Secretary erroneously assumed that the economics of 1910 were the same as the economics of 1955, the year in question. Agency findings that base metals were discovered in the Quartzville District make invalid the inference that there are no base metals in the district. The erroneous assumption that the claims were inaccessible in 1955 before the Forest

Converse offered the testimony of four Geologists. Two of these had earned doctorates, one, with a master's degree, had worked with the United States Geological Survey, the fourth had had much experience in prospecting. In addition, Converse offered the testimony of a mining man employed by the United States Department of Agriculture and that of a prospector who had had thirty years' experience. All testified that the lodes discovered on the Edith and Paymaster Claims consist of sulfide minerals in quantities sufficient to justify a prudent man in spending time and money to develop the claims.

Forestry offered testimony of Mr. Suchy as to the Edith and that of Mr. Holmgren as to the Paymaster. Forestry offered no rebuttal of mining claimant's testimony. Mr. Suchy testified that the discoveries of mineral on the Edith justified a prudent man in spending time and money to explore the ore body discovered to determine its extent. He testified that a prudent man would be justified in exploring the claim. The work he said he would do included development work. He advised Mr. Converse to spend time and money on the claim.

In this review of administrative proceedings, we have not asked the courts to weigh the evidence. No matter how heavily the evidence weighs in favor of the Mining Claimant, the Hearing Examiner has the power to reject it. And the Courts are bound by his findings if these are supported by any evidence. If we accept the conclusion that no discovery had been made as being a ultimate finding of fact, although specific findings of fact establish the contrary, then the Secretary could invalidate any mine by this method, no matter how rich, for want of discovery.

We have tried to make clear that we are concerned here with findings of basic facts which establish that discoveries were made, as distinguished from findings of ultimate fact. If the findings of basic facts contradict the finding of ultimate fact or conclusion, then the conclusion has no validity.

As requested by Converse, the Hearing Examiner made basic findings of fact

with respect to the area on the Edith exposed by Converse before July 23, 1955. The Examiner found that sulfide mineralization was discovered in a lode. Samples of the lode assayed high mineral values. Requested findings Nos. 3, 5, 7 and 12. It was stipulated that Exhibit 34 contained 60% lead and 20% zinc (Tr 221, 222). A sample on assay certificate, Exhibit 1, showed 61.2% lead and 35% copper. Another sample contained .12 oz gold, 43% lead and 4.15% copper. The first sample was valued at \$150 per ton; the second sample was valued at \$31.86 per ton. Finding No. 5. The findings establish that the average values were several times the value of similar ores mined in the United States. (Tr 117, 118).

These facts show no resemblance to the kind of property described in United States v. Iron Silver Mining Co., 128 U.S. 673, where mere indications of mineralization in lodes which could not be clearly ascertained did not evidence discovery. The Converse claims did not show mere indications or scattered bits of mineralization, but a substantial lode of sulfide mineralization with assays showing high values.

As to the area exposed and sampled after July 23, 1955, the Examiner refused to make findings, and those values were not included in the findings mentioned above.

We are concerned with finding basic facts as distinguished from finding ultimate facts. The reasons for requiring the basic facts to be found is explained in Saginaw Broadcasting Co. v. Federal Communications Commission, 68 USCS Dist. of Columbia 282, 96 F 2d 554 Cert. den. 59 S.Ct. 72:

p. 559 "The requirement that courts, and commissions acting in a quasi judicial capacity, shall make findings of fact is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extra legal considerations; and findings of fact serve the additional purpose where provisions for review are made, of apprising the parties and the reviewing

tribunal of the factual basis of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law, or, on the contrary, upon arbitrary or extralegal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact, the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts."

p. 560 "We now rule that findings of fact to be sufficient to support an order, must include what have been described above as the basic facts from which the ultimate facts in terms of the statutory criterion, public convenience interest or necessity are inferred

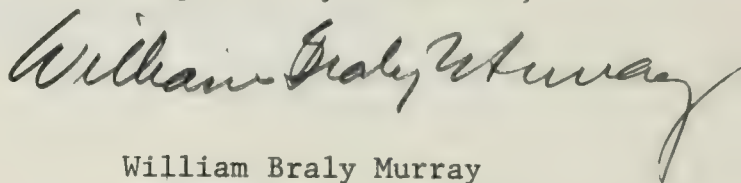
Mr. Justice Douglas has admonished us that, "Unless we make the requirement for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty. This case is perhaps insignificant in the annals. But the standard set for men of good will is even more useful to the venal." New York v. U. S., ICC et al, 342 U.S. 882, 72 S.Ct. 152, 153.

New discoveries of mineral reserves determine the life span of mining companies. The economic rule of prospective profitability adds a heavy burden to the discovery requirement. On the one hand the miner is told you must prove economic

profitability, and on the other is prevented from doing so by fixing the price of metals, e.g., the price of gold was fixed at a 1934 price and the miner is held to strict proof to show with 1955 costs, he can earn a profit.

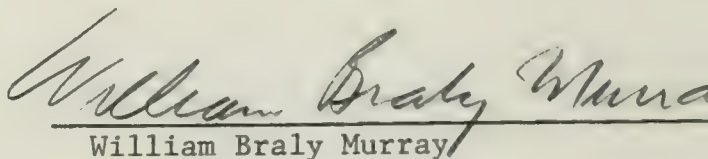
For the foregoing reason, we respectfully petition this Honorable Court for a rehearing to reverse its decision and to remand this case to the Secretary for a new trial.

Respectfully submitted,



William Braly Murray
Attorney for Appellant
525 Failing Building
Portland, Oregon 97204
226-3819

I, William Braly Murray, certify that the foregoing petition for rehearing is in my opinion well founded in law and it is not filed for the purpose of delay that said petition has been prepared in accordance with Rule 32(2) and Rule 40 of the Federal Rules of Appellate Procedure.


William Braly Murray

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDEPENDENT QUICK SILVER COMPANY,
APPELLANT,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF AND APPENDIX FOR THE APPELLANT

William B. Murray
Attorney for Appellant
525 Failing Building
Portland, Oregon 97204

FILED

MAY 11 1967

MAY 8 1967

WM. B. LUCK, CLERK

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Attorney for Appellant
525 Failing Building
Portland, Oregon 97204

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43 CFR §221.68	Appendix 51

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21698

INDEPENDENT QUICK SILVER COMPANY,

APPELLANT,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

APPELLEE,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF AND APPENDIX FOR THE APPELLANT

NATURE OF THE CASE

The mining claimant appeals from a summary judgment of the District Court for Oregon affirming a decision of an assistant solicitor for the Secretary of the Interior. The administrative decision made the surface resources of the Edith and Paymaster lode claims¹ subject to the limitations and restrictions of section 4 of the Act of July 23, 1955,² on the ground that the

1/ The Twenty-two claims in controversy are listed in Exhibit "S" Appendix p. 102.

2/ 30 USC §613

mining claimant failed to make discovery of a valuable mineral deposit within the purview of the mining laws prior to that date, and that the markers showing the boundaries of the claims had not been maintained.

The administrative decision departs from the settled law with respect to mining titles. It disturbs the foundation upon which title to all located mining claims rests.

STATEMENT OF PLEADINGS AND JURISDICTIONAL FACTS

The mining claimant filed a complaint seeking judicial review of the administrative proceeding which had been initiated by the Forest Service, United States Department of Agriculture, and heard and determined by the Department of the Interior.

The claimant alleged: It is a citizen of Oregon. Stewart L. Udall is the Secretary of the Interior of the United States. The mining claims are in Oregon. The amount in controversy exceeds \$10,000. It had exhausted its administrative remedies. It charged that the Secretary was in error as a matter of law in listed particulars. R 1.

The Secretary moved for summary judgment based on the administrative file, marked exhibit 1, attached in support of his motion. This exhibit contains the administrative record, the exhibits and the transcript of the testimony before the Hearing Examiner. The court below allowed the Secretary's motion for summary judgment. R 143. The company filed a motion for reconsideration. R 144. The court denied the motion. R 382.

The appellant filed notice of appeal. R 164. Bond for cost on appeal.

R 166. Decision of the court. R 167. Points relied upon on appeal. R 169.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The District Court of the United States had jurisdiction of this action under the Administrative Procedure Act of June 11, 1946, 60 Stat. 243, 5 USC §1009; the Act of June 25, 1948, as amended, 62 Stat. 964, 28 USC §§ 2201, 2202, whereby relief is provided by declaratory judgments; the Act of June 25, 1948, Ch. 646, 62 Stat. 930, 28 USC §1331, as amended, with respect to actions arising out of the Constitution and laws of the United States; the Act of October 5, 1962, 76 Stat. 744, 28 USC §1361, which authorizes action to compel an officer of the United States to perform his official duty with respect to real property; and the inherent power of the Court to grant injunctive relief in the premises.

JURISDICTION OF THE UNITED STATES COURT OF APPEALS

The jurisdiction of this honorable Court arises under 28 USC §1291.

QUESTIONS PRESENTED

1. Whether an administrative attempt to exercise power over mining claims under the Surface Resources Act is a nullity when there is an administrative failure to comply with the mandatory statutes as to the manner and circumstances under which agency power may be exercised.
2. Whether the discovery of 18,600 tons of cinnabar ore having an average value of 5.2 lbs. per ton of mercury and a total value in place in excess of \$368,880 is a discovery within the meaning of the mining law.
3. Whether Government's evidence that mineral examiners, inexperienced with cinnabar, went on mining claims and sampled country rock on

one claim is substantial evidence to establish a prima facie case of lack of discovery on twenty-one claims not sampled.

4. Whether claimant forfeits title to a mining claim where boundary markers are obliterated or disappear as a result of passage of time or removal by other people.

5. Whether a hearing examiner is disqualified under the Administrative Procedure Act from hearing a case when he has signed a notice of hearing asserting the charges at the direction of the prosecuting agency.

STATUTES

Surface Resources Act - 30 USC §613 (a), (c), (e): Section 613 (a) sets out in detail the procedure designed to make §612 retroactive in its application to mining claims located prior to July 23, 1955, effective date of the act. Section 613 (a) grants power to forestry to initiate a proceeding to contest title to a mining claim. See Appendix p. 45.

Section 613 (c) grants power to Interior to hear and decide such controversies and requires that Interior shall follow its established practice with regard to contests or protests. See Appendix p. 47.

43 CFR §§221.51, 221.52, 221.53, 221.58, 221.64, 221.68 provide for the filing of a complaint in contests and protests. See context of regulations in Appendix p. 48, 49, 50, 51.

Section 613 (e) provides that administrative failure to comply with requirements of sub-section (a) by failing to mail copy of published notice shall render proceedings wholly ineffectual. See Appendix p. 48.

Administrative Procedure Act 5 USC §1004 (c) , 5 USC §1005 (b) ,
5 USC §1008 (a) , 5 USC §1009 (c) .

Section 1004 (c) provides that the hearing examiner shall not be subject to the supervision or the direction of any officer or agent engaged in the performance of investigative or prosecuting function for any agency. See Appendix p. 51.

Section 1005 (b) provides that no process , requirement of a report , inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. See Appendix p. 52.

Section 1008 (a) provides that no sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law. See Appendix p. 52.

Section 1009 (c) provides that every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. See Appendix p. 52.

30 USC §§ 21 ,22 , 26 relate to mineral lands and mining. See Appendix p. 53 , 54 .

30 USC §28 relates to mining district regulation by miners; etc , and provides that the location must be distinctly marked on the ground so that its boundries can be readily traced. The claim must be described by reference to some natural object or permanent monument as will identify the claim. See Appendix p. 53 .

STATEMENT OF FACTS

The court below concluded that agency compliance with the statutory conditions upon which agency power depends was not necessary. It found that no complaint had been filed, no service of published notice had been made, and that no certificate of title accompanied the statutory request which initiated the proceedings. Nevertheless, the court upheld those proceedings. The opinion of the District Court is set out in the Appendix at page 116.

The Hearing Examiner determined that the discovery of 18,600 tons of cinnabar ore having an average value of 5.2 lbs. per ton of mercury was a discovery within the meaning of the mining law. He found that this deposit was on the Bonanza claim. The average value of a 76 pound flask of mercury in 1955 was \$290.35 per flask. He determined that the Government's evidence was sufficient to establish a prima facie case as to the other twenty-one claims in controversy. The Government's mineral examiners, inexperienced with cinnabar, went on the mining claims and sampled country rock on one claim but did not take any samples on the remaining twenty-one claims. Admin. file, Ex. 1.

Both the mining claimant and the Government appealed from the Hearing Examiner's decision. The Secretary reversed the Examiner's finding that a mineral discovery had been made on the Bonanza claim. He rejected the evidence of mineral discovery shown by reports of mining engineers for the mining claimant and substituted as basis for the decision his own assumption that samples taken and assayed under the direction of George Hogg, mining engineer were not assayed in accordance with standard practice. The Secretary affirmed the examiner's determination that the Government had

established a prima facie case by substantial evidence.

The twenty-two lode claims in controversy were located between 1929 and 1932 for cinnabar, an ore for mercury. They are within the Ochoco Mining District in Crook County in Oregon. The names of each claim, the date recorded, names and witnesses, and book and page number where recorded are set forth in Exhibit "S", Appendix p. 101.

There is a record of mercury production in the area of some 1,400 flasks, Tr 7. Adjoining the twenty-two claims on the southwest is the Motherlode group of claims. A major mineralized fracture known as the Johnson Creek Fault has been identified as extending through the Motherlode group, the Independent group in issue, and on several other locations beyond these main groups. Recently the owners of the Motherlode claims have secured a loan from the Office of Mineral Exploration of the Department of the Interior for further work on their claims. Holt p. 2, Adm. file, Ex. 1.

A two or three hundred thousand dollar mill is on the Motherlode claims, and ores from the Independent claims could be processed in this mill, Tr 143. Approximately \$100,000 has been spent on the claims in issue, \$80,000 in cash and \$20,000 in services, Tr 137.

<u>WITNESS - CONTESTANTS</u>	<u>DIRECT</u>	<u>GROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Lloyd E. Holmgren	4	20	37	
Raymond F. Shirley	38	46	68	69
Henry G. Turner	70	71		
<u>EXHIBITS</u>	<u>FOR IDENTIFICATION</u>		<u>IN EVIDENCE</u>	
1. Map made by Mr. Holmgren		9		13
2. Assay certificates of Government's samples IQ-1 through 10		19		19

Mr. Holmgren, for the contestant, went on the ground with Mr. Turner and Mr. Shirley, found a section corner, a permanent monument, and surveyed the boundaries of each claim and mapped them. Exhibit I. His map is accurate as to the boundaries of the claims and each of them, but he was mistaken as to the location of some of the workings. His map of the boundaries of each claim is the same as Mr. Hogg's map of the boundaries of each claim. Exhibit G.

Mr. Loyd E. Holmgren said that he had no experience with cinnabar, Tr 37. The samples taken by him were taken in country rock, weathered basalt, and were not samples of cinnabar ore, Tr 22. Mr. Shirley took no samples and testified that his experience with cinnabar was incidental to the examination of uranium claims, Tr 48. Mr. Holmgren said that he was not qualified to interpret the map or the report about the claims at issue published by the U. S. Department of the Interior, Geological Survey (1949), Exhibits A and B. None of the Government's witnesses expressed an opinion as to whether a reasonably prudent man would be justified in spending time and money with a reasonable prospect of success in developing a valuable mine.

The contestant offered no rebuttal evidence. It did not deny nor offer any evidence to controvert the evidence given by George C. Hogg, a registered professional engineer, nor the evidence of H. F. Byram, registered Professional engineer, and that of Burton Westman, Geologist and Engineer. There is no least denial by any evidence of the reports received in evidence written by George C. Hogg (1930), Exhibit P, Appendix p. 88, Report of 1942, Exhibit I, Appendix p. 56, Report of 1955, Exhibit O, Appendix p. 87.

Nor did the contestant controvert the report by H. F. Byram (1932) , Exhibit L, Appendix p. 82 , Nor the reports by Burton J. Westman (1951) Exhibit V, Appendix p. 104 and report (1952) Exhibit W, Appendix p. 108.

No complaint was filed and no charge was asserted that there was a lack of discovery on each of the claims in controversy. Nor was there any charge asserted that the boundaries had not been marked on each claim when it was located. There ~~were~~ no pleadings and the Government offered no proof as to each of the twenty-two claims separately. The Secretary said that the Government was not able to present evidence as to each of the twenty-two claims separately, R 291, and that it was not necessary for the Government to make out a prima facie case of lack of discovery as to each claim.

<u>MINING CLAIMANT'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
George C. Hogg	76	115	118	
Lloyd L. Bartlett	123	138	141	
Robert W. Casebeer	143	164	174	
Joseph Enginger	176			
Lynn D. Johnson	181			
Alfred H. Mealey	185			

<u>MINING CLAIMANT'S</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
Ex. A. Preliminary Report of the Geophysical Survey of Part of the Johnson Creek Area, Ochoco Quicksilver District, Oregon, by G.D. Bath and K. L. Cook	30	65
Ex. B. Geophysical Map G.D. Bath and K. L. Cook	32	64
Ex. C. Map of Mineral Deposits of Oregon	63	64
Ex. D. Map showing general area Ochoco Quicksilver District	65	65
Ex. E. Map showing relationship of Mother Lode property to the Independent Mine	65	66

FINDINGS OF FACT

Requested Finding No. (1). That Independent Quick Silver Co. is the

owner of 22 unpatented mining claims, named, located, and listed under "The Company's Property" above. Ruling: "Finding No. 1 is adopted."

Requested Finding No. (2). That Exhibit "G" attached hereto is a map

of the claims, and the map correctly shows the boundaries thereof, and the names of each of the 22 claims referred to in requested finding No. (1). That said claim and plan map was prepared by George C. Hogg, registered professional mining engineer, April 29, 1940. Ruling: "Finding No. 2 is adopted. The accuracy of Exhibit G was assumed for the purpose of the decision."

<u>MINING CLAIMANT'S</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
Ex. F. Aerial photograph	74	75
Ex. G. Map prepared by Mr. Hogg	79	100
Ex. H. Map prepared by My. Hogg	81	100
Ex. I. Report by Mr. Hogg(some missing pages)	82	100
Ex. J. Report by Mr. Hogg(with missing pages in Exhibit I)	83	100
Ex. K. Longitudinal section showing area calculated as probable ore, 18,600 tons.	84	100
Ex. L. Report by H. F. Byram, Nov. 6, 1932	85	131
Ex. M. Copy of map included in I on larger scale	88	101
Ex. N. Copy of map included in I on larger scale	88	101
Ex. O. Mr. Hogg's supplementary report, June 29, 1955, on examination made in 1942	102	106
Ex. P. Mr. Hogg's preliminary report, 1930	102	102
Ex. Q. Drill hole logs	106	109
Ex. R. Resume of assays - Burton Westman	124	127
Ex. S. Record of claims with book and page no.	127	128
Ex. T. Report by H. F. Byram, Nov. 6, 1932, as being a part of Exhibit V	128	134excluded
Ex. U. Records of drill holes 1 through 4 on the Bonanza	130	132
Ex. V. Report by Burton J. Westman, Oct. 11, 1951	132	133
Ex. W. Report by Burton J. Westman, 1952	132	134
Ex. X-1 to X-23. Photographs	143	160

Requested Finding No. (3). The Contestant has not offered evidence

of sampling, nor any substantial factual evidence, pertaining to each of said 22 claims with respect to the quantity and quality of minerals thereon, and therefore has not made a prima facie case as to each of the claims challenged.

Ruling: "Finding No. 3 is denied for the reasons set forth in the decision."

Requested Finding No. (4). George C. Hogg, is a registered professional

mining engineer, licensed by the State of Oregon to practice mining engineering in the State. He was formerly Chief engineer for Senator Clarke of Montana, (Fabulous Copper King). From June, 1939 to May, 1940, Mr. Hogg was employed by Independent Quick Silver Co. to study the mine, and in May, 1940 wrote a report to the company concerning the history and development of the property and the work done on the property. Exhibits "I" and "J". Ruling: "Finding No. 4 is adopted."

Requested Finding No. (5). Separate Findings are specifically requested

concerning the facts reported in 1940 by Mr. Hogg.

(A) "Geology and Ore Genesis", pp. 3-6, Exhibit "J".

(B) "History and Development", p. 14 to and including the fourth full paragraph on p. 15, Exhibit "J".

(C) Report of work accomplished under Mr. Hogg's supervision from June, 1937 to May, 1940, commencing last full paragraph on p. 15, to and including p. 21, Exhibit "J", and including facts with respect to cuts "A" to "G" inclusive on Bonanza, Happy Chance and New Era; totalling 2600 ft. excavating 7650 cubic yards, including 1498.7 ft. of drill holes, and 245 ft. of trenching on the Green Back claim and sampling results thereof.

(D) That the samples were taken five foot intervals as reported by Mr. Hogg under "Sampling" on p. 23, Exhibit "J".

(E) That "Ore Reserves" were developed as reported on p. 23, Exhibit "J". Specifically a block of ore $\frac{155 \times 18 \times 80}{12} = 18,600$ tons of 5.2 lbs. per ton, p. 24, Exhibit "J".

(F) Judicial notice should be taken that at the effective date of the "Multiple Use Act", the mercury market was \$325.00 per 76 lb. flask. Thus the block of ore at that time had a value in excess of \$386,880.00.

(G) That Mr. Hogg recommended specific work to be done on the property in accordance with "Recommended Development", p. 22, Exhibit "J", totalling \$25,000.00 to develop additional ore, inasmuch as the ore already developed would be sufficient only for one years operation for a 50 ton reduction plant. Ruling: "Finding No. 5 is adopted except that the average value of mercury in 1955 was \$290.35 per flask. There was no evidence at the hearing that the value of mercury on July 23, 1955 was \$325 per flask."

Requested Finding No. (6). Separate Findings are specifically requested with respect to the facts stated in the "Resume of Assays", Exhibit "R", Tr. 124, listing the date samples were taken, the location of the samples, laboratory numbers, names of assayer, per cent of mercury, and pounds per ton, approximately 291 samples and assays compiled by Burton J. Westman, B.Sc., geologist, with respect to the Independent Quick Silver Mine. Ruling: "Finding No. 6 is denied. There was insufficient foundation to support Exhibit R."

Requested Finding No. (7). Separate findings with respect to the faulting pattern, and directions of each pattern, intersecting faults, dikes,

and igneous intrusions concerning the Independent Quick Silver Mine.

(A) As stated in the reports of Burton J. Westman, B.Sc., geologist, of October 11, 1951, and November 25, 1952.

(B) As stated in the report of C. D. Bath and K. L. Cook. Preliminary Report on a Geophysical Survey of a Part of the Johnson Creek area, Ochoco Quick Silver District, Oregon, published by U.S.G.S., 1949, concerning geological structure of the Independent Quick Silver Mine, and

(C) As stated by H. F. Byram, mining engineer (R.F.C.) in his report of November 9, 1932. Ruling: "Finding No. 7 is adopted to the extent that the facts are recited in the decision."

Requested Finding No. (8). That the photographs, Exhibits X1 to X23 inclusive, are correct and true views of certain workings photographed on the claims in question, as explained by Robert W. Casebeer. (Tr. 143-164)

Ruling: "Finding No. 8 is adopted."

Requested Finding No. (9). That the "Drill logs", Exhibit "G", Tr. 106, 109, are a correct record of the results of drilling at the places to the depth with the results as shown by said Exhibit and maps. Plates I through V accompanying Mr. Hogg's report of May, 1940, Exhibit "J". Ruling: "Finding No. 9 is adopted except that the drill logs are in Exhibit Q and there is no plate 1 with Exhibit J."

Requested Finding No. (10). That the Department of the Interior, Office of Minerals Exploration, has entered into an \$80,000.00 exploration contract with Pacific Minerals and Chemical Co., Inc., to explore the same structure veins extending into the Mother Lode Mine from the Independent

Mine to the South (Tr. 34). Ruling: "Finding No. 10 is adopted as amended to read that the Office of Mineral Exploration has loaned money for the exploration of the Mother Lode property."

Requested Finding No. (11). That Lloyd E. Holmgren, mining engineer for the government, has not had any experience with Cinnabar or in operating a Cinnabar mine, Tr. 21. All ten samples taken by the government were in Basalt, not in the Clarno or Ochoco formations, Exhibit "2", Tr. 22. (Shirley Tr. 54). Ruling: "Finding No. 11 is adopted."

Requested Finding No. (12). Mr. Holmgren testified that the claims were south of the Section Marker (corner point, Sec. 16, 17, 20, 21) Tr. 11, Mr. Shirley testified the same section marker was north of the claims, Tr. 47. Ruling: "Finding No. 12 is incorrectly worded. Mr. Holmgren testified that the section corner was south of the claims not that the claims were south of the corner. Mr. Shirley testified that the corner was northeast of the claims."

Requested Finding No. (13). Mr. Holmgren testified that Mr. Casebeer was with him when samples were taken over a period of three days. Tr. 14, 20. Mr. Shirley testified that Mr. Casebeer spent one day and a fraction of the next day when samples were taken. Tr. 427. Mr. Casebeer was on the property less than one hour. Stated he had maps, drill logs, and records available, and would be glad to show them, if requested. No request was made. He left the property, Tr. 145. Ruling: "Finding No. 13 is adopted to the extent that the facts are recited in the decision."

Requested Finding No. (14). That Mr. Bartlett told Mr. Holmgren and Mr. Shirley, "we had information we would be glad to give them and also if

they went up to make an examination we would like to know so we could have someone, who knew something about the property could be there, and requested that they notify me. Q - and did they ever notify you? A - No. Mr. Reed had nothing to do with the Mine or the company. Q - Did you ever see Mr. Holmgren and Mr. Shirley up at the property at all? A - No, I did not. Q - You never did." (Tr. 136). Ruling: "Finding No. 14 is adopted although it is not an accurate quotation."

SPECIFICATIONS OF ERROR

We will prove our case by showing that the District Court erred as a matter of law in allowing the Secretary's motion for summary judgment and affirming the administrative decision.

1) Since the Surface Resources Act makes mandatory, under §613 (c) that a complaint be filed stating the facts constituting the grounds of contest, the court below erred in holding that no complaint was necessary.

2) Since the court below found that a copy of the published notice had not been served on the mining claimant as required by §613 (a), the court erred by failing to hold that the publication was a nullity under §613 (e) and to reverse the Secretary for his failure to exercise administrative power in accordance with the statute upon which that power depends.

3) Since the court below found that no certificate of title accompanied the statutory request initiating the proceeding under §613 (a), it erred in failing to hold the proceeding a nullity and to reverse the Secretary for non-compliance with the statute upon which his power depends.

4) Since the facts show that a block of 18,600 tons of cinnabar ore was discovered on the Bonanza , such cannot be disregarded on the pretext that evidence of assays was hearsay , nor by the substitution of agency assumption for evidence that the assays were taken in accordance with standard practice , and the court below erred by its failure to correct these administrative errors .

5) Since the contestant did not plead nor prove a prima facie case by substantial evidence as to each of the claims contested , the court below should have corrected this administrative error in failing to dismiss the case , at least as to twenty-one claims which were not sampled .

6) Since the contestant did not plead and prove that the boundaries of each of the claims had not been marked when located in 1929-1932 , the absence of markers through no fault of claimant in 1962 , does not cause a forfeiture of the claims , and the court erred in failing to correct this administrative error .

7) Since the hearing examiner signed a notice of hearing asserting the charges at the direction of the prosecuting agency the court below failed to correct the administrative decision holding that the examiner was not disqualified under the Administrative Procedure Act , 5 USC §1004(c) .

1/ The District Court's opinion of September 14 , 1966 , is set forth in full in Appendix p. 116 .

2/ The District Court's opinion of November 30 , 1966 , denying motion for new trial is set forth in full in Appendix p. 139 .

SUMMARY OF THE ARGUMENT

The District Court erred as a matter of law in allowing the Secretary's motion for summary judgment and affirming the administrative decision.

The first three specifications of error concern the exercise of agency power where the agency has failed to comply with the conditions of the statute which created that power. We are concerned with agency noncompliance with the condition upon which agency jurisdiction over the subject matter is made to depend. We are not concerned with jurisdiction over the person.

The fourth specification concerns the application of the law of mineral discovery to the established facts, the rejection of assays as hearsay and assumption contrary to the established evidence. The fifth contends that the contestant did not plead nor prove a prima facie case as to each claim concerning claims which were not sampled. The sixth concerns contestant's failure to plead and prove that the boundaries of each of the claims had not been marked. The seventh concerns the qualification of the hearing examiner, who asserted charges at the direction of the prosecuting agency, to hear the case under the Administrative Procedure Act, 5 USC §1004 (c).

1. The court below found that no complaint was filed and concluded that none was necessary. The Surface Resources Act, 30 USC 612, amends the mining law. It makes mining claims subject to the rights of the Government, its permittees and agencies to use the surface of mining claims, and §613 (a), sets out in detail, the procedure designed to make §612 retroactive in its application to mining claims located prior to July 23, 1955 effective date of the Act.

Section 613 (a) grants power to Forestry to initiate a proceeding to determine title to mining claims. Section 613 (c) grants power to Interior to hear and decide such controversies and requires that Interior shall follow its established practice with regard to contests or protests. The established practice requires the filing of a complaint setting forth a statement in clear and concise language of the facts constituting the grounds of contest. 43 C.F.R. 221.54.

The notice published under §613 (a) is not a complaint because it does not state facts constituting the grounds of contest. It requires the mining claimant to state the date, book and page where recorded, legal description of his claim, and whether he is a locator or a purchaser. R 320.

The Administrative Procedure Act makes mandatory that no process shall be enforced in any manner except as authorized by law. 5 USCA 1005 (b), 1008 (a). Agency power must be invoked in the manner provided by statute. Unless agency power is exercised strictly according to the procedures fixed by the statute granting the power, the action is a nullity.

2. The court below found that a copy of the published notice had not been served on the mining claimant as required by §613 (a). The court erred by failing to hold that such publication was a nullity under §613 (e), which provides that failure to serve a copy of the publication renders the proceeding wholly ineffectual. Such failure was agency noncompliance with a mandatory statute.

3. The court below found that no certificate of title accompanied the statutory request initiating the proceeding under §613 (a). The court erred by

failing to hold that the proceeding was a nullity and to reverse the Secretary for noncompliance with the statute upon which his power depends.

A certificate that there are "no tract indexes", R 318, is no substitute for a "certificate of title" prescribed by §613 (a).

It is impossible to reconcile the certificate of the attorney for Forestry that there are no tract indexes, R 318, with the affidavit of Mary Belle Raymond, R 310, that she mailed a notice to each of the mining claimants whose name and address is set forth in the certificate of examination of tract indexes relating to lands described in the published notice.

The legislative history shows that Congress intended to set up technical procedural safeguards to protect bona fide mining claimants against harrassment by administrative agencies. U.S. Code, Cong. and Adm. News, 84th Congress 1st Session, 1955, Vo.. 2, p. 2479.

4. The hearing examiner found that there was a block of ore containing 18,600 tons of cinnabar which assayed 5.2 lbs. per ton of mercury. The price of mercury during 1955 was \$290.35 per flask. There are 76 pounds of mercury in a flask. Thus the ore in place on the Bonanza had a value in excess of \$368,880 at the 1955 price. This ore already developed would be sufficient for one year's operation for fifty ton reduction plant. The examiner held that this was a discovery as a matter of law on the Bonanza claim. The Secretary reversed. See p. 12 of this Brief.

The hearing examiner found that the assaying and sampling procedures followed by Mr. Hogg were in accordance with good professional practice. See p. 12 of this Brief. Exhibit J, p. 23. Mr. Hogg's testimony was not

hearsay. He said that his sworn testimony here would be the same as written in his report, Exhibit J of Appendix p.56. He described the method of sampling under "sampling" in Exhibit J of Appendix p.79. The assaying was done under Mr. Hogg's personal direction. He and Mr. Champion would pan their samples and compare results and then they would have check assays made with the Montana Assay Office. It was possible to pan the mineral within a very accurate degree. For practical purposes it was just as accurate as assaying. It was the standard practice in checking cinnabar, Tr 109-110. No evidence was offered to contradict or deny this testimony. No rebuttal was offered. But the Secretary substituted his assumption to the contrary. The court below erred in failing to correct the agency ruling.

5. The contestant did not plead nor prove a prima facie case by substantial evidence as to each of the claims contested. Twenty-two claims were contested. Each claim is a separate case and is the unit for investigation. The Secretary said that the Government was not able to present evidence as to each of the twenty-two claims separately, R 291, and that it was not necessary for the Government to make out a prima facie case of lack of discovery as to each claim. There was no complaint nor any charge alleging want of discovery as to each claim. The claimant had the right to know what its opponent claimed and contended. Was the inquiry to be directed to whether a discovery had been made on the twenty-two claims as a group or as to each claim comprising the group? The right to know means the right to a meaningful hearing with the awareness of what matters must be countered. Gonzales v. United States, 348 US 407, 99 L. ed. 467, 75 S Ct. 409. Congress in

providing for a hearing did not intend for it to be conducted on the level of a game of Blind Man's Buff. Simmons v. United States, 348 US 397, 99 L ed 453, 75 S Ct 397.

The contestant did not prove a prima facie case by substantial evidence. The Government's evidence that mineral examiners, inexperienced with cinna-bar, went on the mining claims and sampled country rock on one claim is not substantial evidence to establish a prima facie case of lack of discovery on the twenty-one claims not sampled. Tr 37, 22.

6. The contestant did not plead and prove that the boundaries of each of the claims had not been marked when located in 1929-1932. The absence of markers through no fault of claimant in 1962 does not cause a forfeiture of the claims.

There is no pleading alleging, no proof establishing, that the claims were not marked when located. But the contention is made that the failure to maintain the markers in 1962 when the claims were visited by the Government examiners caused a forfeiture of the claims.

A location requires two acts: a discovery and a marking of the boundaries. Cole v. Ralph (1929) 252 US 286, 296. When the discovery is made and the boundaries are marked the locator's right to the ground embraced within his claim is vested. His rights are not divested if his markers are obliterated or disappear, whether their loss is a result of the passage of time or their removal by other people.¹

1/ Bender v. Lamb, 133 Cal. App 348, 24 P 2d 208, Cert. Den. 291 U.S. 662; Walton v. Wild Goose Mining & Trading Co., 123 Fed. 209, 218, (9 Cir 1903) Cert. Den. 194 U.S. 631 (1904); Larned v. Dawson, 90 F. Supp 14 (D. Alaska 1950).

7. The charge of want of discovery was asserted by the hearing examiner over his signature at the direction of Forestry, the prosecuting agency. The court below erred by failing to hold that the mining claimant's motion for change of hearing examiner should have been allowed under the Administrative Procedure Act. A hearing examiner is disqualified from hearing a case if he acts at the direction of an agency engaged in the performance of investigating or prosecuting functions. Forestry was so engaged and the examiner acted at the direction of the agency. 5 USC 1004 (c).

ARGUMENT

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN ALLOWING THE SECRETARY'S MOTION FOR SUMMARY JUDGMENT AND AFFIRMING THE ADMINISTRATIVE DECISION.

The Surface Resources Act, Public Law 167, was enacted July 23, 1955, 69 Stat. 368, 30 USC 612, 613, (Supp. 1965).

Section 612 makes unpatented mining claims located after July 23, 1955, subject to the Government's right to manage surface resources and to manage and dispose of vegetative resources, except mineral deposits subject to location under the mineral laws of the United States. And, it makes the claims subject to the right of the United States, its permittees and agencies, to use so much of the surface thereof for such purposes or for access to adjacent lands.

Section 613 (a) sets out a detailed procedure designed to make §612 retroactive in its application to mining claims located prior to July 23, 1955, as to claims alleged to be invalid. The head of any agency responsible for

administering lands of the United States may initiate a proceeding for determination of the surface rights of lands he is charged with administering.

Section 613 (c) provides that after the prosecuting agency has complied with the provisions of section (a) , the Secretary of the Interior shall have power to hear the case and make a determination of the facts in accordance with the procedures then established by the Department of the Interior in respect to contests or protests affecting public lands of the United States .

There is no presumption of lawful exercise of authority enjoyed by administrative agencies . Jurisdiction of the subject matter by administrative agencies must be pleaded and proved. Phillips v. Fidalgo Island Packing Co., 230 F 2d 638, 16 Alaska 12, Rehearing denied 238 F 2d 234, 16 Alaska 338, Cert. den. 77 S Ct. 262, 352 U.S. 944, 1 Led. 2d 237, 16 Alaska 561.

The powers of inferior courts and administrative agencies created by Congress are confined to those bestowed by Congress. Marquette Cement Mfg. Co. v. Federal Trade Commission, 147 F 2d 589, (CCA 7 1945). Expertise possessed by an administrative agency does not empower the agency to rewrite the laws which it has been charged with enforcing. Atlanta Trading Corp. v. Federal Trade Commission, 258 F 2d 365 (CA 2 1958). And Administrative powers cannot be created by the courts in the proper exercise of their judicial functions. Federal Trade Commission v. Raladam Co., 283 U.S. 643, 51 S. Ct. 587.

We are concerned here with the exercise of agency power in accordance with the conditions of the statutes which created that power. We are not concerned with jurisdiction over the person but with agency noncompliance

with the conditions upon agency jurisdiction over the subject matter is made to depend.

I

SINCE THE SURFACE RESOURCES ACT MAKES MANDATORY, UNDER §613(c) THAT A COMPLAINT BE FILED STATING THE FACTS CONSTITUTING THE GROUNDS OF CONTEST, THE COURT BELOW ERRED IN HOLDING THAT NO COMPLAINT WAS NECESSARY.

The power of the Secretary of the Interior to hear cases and determine them under §613 (c) is made to depend upon the Secretary's compliance with the provisions of the statute which creates that power. Section 613 (c) requires that: "The procedures with respect to notice of such a hearing and the conduct thereof...shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States".

The legislative history makes clear that the Department of the Interior is required to follow established procedures with respect to contests or protests affecting public lands. Report No. 730 of the House Committee on Interior and Insular Affairs, emphasizes this point as follows:

"Such hearing would, under the bill, follow the established procedures and rules of practice of the Department of the Interior with respect to contests or protests affecting public lands."

U. S. Code, Cong. and Admin. News, 84th Congress, 1st Session 1955, Vol. 2, p. 2485. (Emphasis supplied)

The established rules of the Department of the Interior require that an initiation of a contest must be by complaint. (Part 221) 43 CFR 221.63. The Complaint shall contain "a statement in clear and concise language of the facts constituting the grounds of contest". 43 CFR 221.54. By the use of the

word "shall", the act makes mandatory that the then established rules of procedure of the Department as to contest proceedings be followed in cases brought under the act.

Section 221.63 - Initiation of Contest. This regulation requires that initiation of a contest must be by a complaint, which must be filed in the Land Office, or if none, in the office of the Director, Bureau of Land Management, Washington, D. C.

Section 221.54 - Contents of Complaint. This regulation requires that the complaint shall contain certain information and shall be under oath. It requires "a statement in clear and concise language of the facts constituting the grounds of contest". (Emphasis supplied)

Section 221.68 - Proceedings in Government Contests. This regulation requires that "The proceedings in Government contests shall be governed by the rules relating to proceedings in private contests."

The notice published under §613 (a) cannot function as a complaint since it does not contain "a statement in clear and concise language of the facts constituting the grounds of contest". (Emphasis supplied). The publication did nothing more than to request mining claimants to file the following information: 1. the date of their mining locations, 2. book and page where notice is recorded, 3. sections in which claims are situated, 4. whether claimant is locator or purchaser, 5. name and address of claimant and persons having interest in the claim. R 320.

The Department's practice of long standing requires a complaint to be

filed in a protest or a contest proceeding. Five cases in the record illustrate this established practice. In United States v. Eleanor A. Gray et al, (1960) Contests Nos. 0-239 to 0-255 inclusive, mineral applications nos. 03034 to 03050 inclusive, it can be seen that the proceedings were initiated by complaints setting forth the grounds of contest. R 188. In United States v. Caldwell et al, Contest No. 146 Oregon (1958) a complaint was served upon the contestees setting forth the grounds of contest. R 179. Likewise, charges were made by complaint setting forth the grounds of contest in United States v. Edwards, (1957), Contest No. 166 Oregon, R 172, United States v. Santiam Copper Mines, Inc., (1957) Contest No. 171 Oregon, mineral application No. 02928. R 335., United States v. Woodard, (1957) Oregon Contests 172 and 173, patent applications 03092 and 03093. R 328.

We have found no case involving protests and contests where a complaint has not been filed. There should be no departure from the established practice in cases under the Surface Resources Act for Congress has said the procedures before the Interior shall be the same.

The Administrative Procedure Act, makes mandatory that no process shall be enforced in any manner or for any purpose except as authorized by law. The act provides: "No process, requirement of a report, inspection or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law". 5 USCA § 1005 (b). And 1008 (a) of the act provides: "No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law." (Emphasis supplied)

The Administrative Procedure Act must be read as a part of every Congressional delegation of authority, unless specifically excepted. Hotch v. United States, 212 F 2d 280. And in Wong Yang Sung v. McGrath, 339 US 33, 94 L ed 616, 70 S. Ct. 445, it was held that proceedings to which the act applies must conform to the procedural safeguards enacted by the act if resulting orders are to have validity.

An Administrative Agency is a tribunal of limited jurisdiction which may exercise only the powers granted by statute reposing power in it. Pentheny Limited v. Government of Virgin Islands, 360 F 2 786 (CA Vir. Islands) 1966. And when Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. Stark v. Wickard, 64 S. Ct. 559, 321 US 288, 88 L ed 733 (US App. D. C. 1944).

The power of an administrative officer is limited to carrying out a law according to its terms. Fidalgo Island Packing Co. v. Phillips, 120 F. Supp 777, Aff. 230 F 2 638, rehearing denied 238 F 2 234, Cert. denied 77 S. Ct. 262, 352 US 944, 1 L ed 2 237. Hence an attempted investigation by an agency lacking legal sanction has no better standing than an interloper. McMann v. S. E. C. (CA 2) 87 F 2d 377, 109 ALR 1445, cert den. 301 U.S. 684, 81 L ed 1342, 57 S Ct. 785; Railroad Comm. v. Horesta Natural Gas, 166 SW 2d 117.

Therefore, since § 613 (c) makes mandatory that a complaint be filed setting forth the facts constituting the grounds of contest, and the Administrative Procedure Act makes mandatory agency compliance with the procedural

requirement of the statute, we respectfully submit that the court below erred in holding that "the use of a complaint is averted by the publication requirements of the statute". Appendix P 132.

II

SINCE THE COURT BELOW FOUND THAT A COPY OF THE PUBLISHED NOTICE HAD NOT BEEN SERVED ON THE MINING CLAIMANT, AS REQUIRED BY §613 (a), THE COURT ERRED BY FAILING TO HOLD THAT THE PUBLICATION WAS A NULLITY UNDER §613 (e), AND TO REVERSE THE SECRETARY FOR HIS FAILURE TO EXERCISE ADMINISTRATIVE POWER IN ACCORDANCE WITH THE STATUTE UPON WHICH THAT POWER DEPENDS.

The court below found that "a copy of the publication was not served on the mining claimant as demanded by the statute. Appendix P 132.

§613 (a) provides that:

"Within fifteen days after the date of first publication of such notice, the department or agency requesting such publication (1) shall cause a copy of such notice to be personally delivered to or to be mailed by registered mail addressed to each person in possession or engaged in the working of the land whose name and address is shown by an affidavit filed asforesaid, and shall cause a copy of such notice to be mailed by registered mail to each person whose name and address is set forth in the title or abstract company's or title abstractor's or attorney's certificate filed as aforesaid, as having an interest in the lands described in said notice under any unpatented mining claim heretofore located, such notice to be directed to such person's address as set forth in such certificate; and (2) shall file in the office where said request for publication was filed and affidavit showing that copies have been so delivered or mailed." (Italics supplied)

§613 (e) provides:

"If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person." (Italics supplied)

Unless the requirements of § 613 (a) are complied with, then the Secretary of the Interior has no authority to conduct any hearing or take any procedure with respect to determining the validity of any mining claim under this Act.

The Act makes mandatory that the prosecuting agency "shall" cause a copy of the publication to be mailed to persons listed in a certificate of title accompanying its statutory letter to the Department of the Interior 30 USC § 613 (a).

It would seem clear that Congress intended that failure to comply with this statutory condition would render the attempted publication a nullity. The legislative history is as follows:

"Subsection (e) of Section 5 provides that the publication of notice shall be wholly ineffectual as to any person entitled to be served with, or to be mailed a copy of the published notice, if the notice is not in fact so served upon or mailed to him."
U. S. Code, Cong. and Adm. News. 84th Congress 1st Session, 1955, Vol. 2 p. 2486.

An attempt to exercise power without compliance with the provisions of the Act as to the manner and circumstances of its exercise is a nullity. 5 USC 1008 (a). Statutory administrative agencies are governed strictly by the statutes from which they derive their existence. N.L.R.B. v. Atlantic Metallic Casket Co., 205 F 2d 931 (CA 5 1950).

Therefore, having found agency non-compliance with the statute, under which the proceeding was brought, the court erred by failing to hold that such attempted exercise of power was a nullity.

III

SINCE THE COURT BELOW FOUND THAT NO CERTIFICATE OF TITLE ACCOMPANIED THE STATUTORY REQUEST INITIATING THE PROCEEDING UNDER § 613 (a) , IT ERRED IN FAILING TO HOLD THE PROCEEDING A NULLITY AND TO REVERSE THE SECRETARY FOR NON-COMPLIANCE WITH THE STATUTE UPON WHICH HIS POWER DEPENDS.

In its opinion, the court below found another instance where administrative power had not been exercised in the manner commanded by the statute. The court said: "No request for publication was accompanied by the required certificate of title or abstract of title. Here the plaintiffs are technically correct..." Appendix P 132.

A certificate of title is required to accompany the statutory letter initiating the proceeding. The title certificate of an attorney for the Department is sufficient, if it is based on tract indices of mining claims in the county records. If there are no tract indices, the certificate of title must be prepared by a title or abstract company or title abstractor. 30 USC § 613 (a)

The legislative history shows that Congress intended to make a title search mandatory.

"...a copy of the notice must be mailed by registered mail to each person who is shown by a title search to have an interest in the lands." U.S.Code, Cong. and Admin. News, 84th Cong. 1st Session, 1955, Vol 2, p. 2485. (Emphasis supplied)

A "Certificate of non-existence of tract indexes" R 318 is no substitute for a "certificate of title" under 30 USC § 613 (a).

It is impossible to reconcile the certificate of the attorney for Forestry that there are no tract indexes R 318 with the affidavit of Mary Belle

Raymond R 310 that she mailed a notice to each of the mining claimants" ... whose name and address is set forth in the certificate of examination of tract indexes relating to land described in said notice".

Congress undoubtedly had in mind the protection of bona fide claimants when it spelled out in the act the procedures to be followed. On the one hand, it wanted to invalidate fraudulent claims; on the other, it recognized that bona fide claimants would suffer from agency harrassment. The legislative history is recorded as follows:

"On the other hand, continual interference by Federal agencies in an effort to overcome this difficulty would hamper and discourage the development of our mineral resources, development which has been encouraged and promoted by Federal mining law since shortly after 1800." U.S. Code, Cong. and Admin. News, 84th Congress, 1st Session, 1955, Vol. 2, p. 2479.

In its effort to protect bona fide mining claimants, Congress must have had in mind the effect of § 612 (c), which prohibits a miner from severing, removing or using surface resources subject to the management of the United States, and that of § 612, which prohibits the Government from "material interference with mining". What to the Secretary is not a material interference can be and often is to a miner a substantial interference, which as a practical matter, often does prevent him from mining.

The intention of Congress is defeated and the statute becomes meaningless if one by one technical safeguards commanded by the mandatory "shall" are disregarded. Lifting limitations on administrative power might very well result in its abuse. Agency power enforcing its edicts is not law when it transcends the limits of a lawful authority, even when acting in the

name and wielding the force of the government. Hurtado v. California, 110 U.S. 516, (1884).

Therefore, since a certificate of title, showing the names of the mining claimants was a mandatory requirement of the Statute, the department's view that no title certificate was necessary should be corrected.

IV

SINCE THE FACTS SHOW THAT A BLOCK OF 18,600 TONS OF CINNABAR ORE WAS DISCOVERED ON THE BONANZA, SUCH CANNOT BE DISREGARDED ON THE PRETEXT THAT EVIDENCE OF ASSAYS WAS HEARSAY, NOR BY THE SUBSTITUTION OF AGENCY ASSUMPTION FOR EVIDENCE THAT THE ASSAYS WERE TAKEN IN ACCORDANCE WITH STANDARD PRACTICE, AND THE COURT BELOW ERRED BY ITS FAILURE TO CORRECT THESE ADMINISTRATIVE ERRORS.

The court below said in its opinion that, "the testimony of a Mr. Hogg, on which the hearing examiner relied, was hearsay". Appendix p. 136.

Mr. Hogg testified in person at the trial: Tr 82-83

Q. (By Mr. Murray) I'll hand you Mining Claimant's Exhibit I, which purports to be a report written July 20th, 1940. Have you read this report?

A. Yes, I've read it, and I was up there at the time.

Q. And this is your report that you wrote at the time, is that correct?

....

Q. Now, did you prepare the maps which are a part of this report?

A. Yes.

Q. And are those based upon actual surveys and samples on the ground?

A. Yes.

Q. And your sworn testimony here would be the same as written in this report?

A. Absolutely, except that I think there's a few pages that are missing. (Exhibit "J" supplied missing pages in Exhibit "I")

Mr. Hogg's testimony about sampling is stated in Exhibits "J" and "I" as follows:

Samples were taken in the dozer cuts A, C, F and G, by cutting a trench 2 to 3 inches in width and depth, respectively, in the center of the bottom of the cut, at 5 foot intervals. In Cut D, the trenches were cut across and up and down the cut at the same intervals. The location and values of samples taken are shown on Plates 2 and 5. These samples were panned, and values listed are panning estimates. Check assays were made frequently to ascertain and assure accuracy of these pannings.

In sampling the drill-holes, the wash water or sludge was saved and combined with the cuttings recovered in the upside down core barrel; the samples thus obtained from each run were panned to determine the value of the material passed through.

The lengths of the runs vary and the location and values of samples taken are shown on Plates 3 and 4. Portions of some of the sludge samples have been bottled and kept to be assayed. The core recovered has been carefully arranged in core-boxes and racked for future reference. Appendix p. 77.

Mr. Hogg testified further about the samples: Tr 109-110.

Q. (By Mr. Murray) Now, with reference to this panning that was done, is it possible to pan this quicksilver after taking many assays and knowing the rock, to pan it within a very accurate degree?

A. Yes.

Q. It is?

A. Yes, sir.

Q. Just as accurate as assaying?

A. Well, I won't say that, but, for all practical purposes, yes.

Q. And that knowledge comes after having many assays run and checking it against the panning results?

A. Very often --

Q. Is that correct?

A. -- when Champion was there, why, he would pan and I would take a portion of his sample and I'd pan, and then we'd compare them.

Q. Yes, and then you would occasionally check assays with the Montana Assay Office?

A. Yes.

Q. To see that you were checking it correctly, is that right?

A. Yes, sir.

Q. And that's standard practice in checking that type of material?

A. Absolutely.

Mr. Hogg was a disinterested witness: Tr 112.

Q. You have never had any personal interest or financial interest in this company or in these claims?

A. No, sir.

Q. And your position has been purely that of a professional engineer?

A. Absolutely, and they paid me my salary.

Q. And they paid you your salary?

A. That's all they paid me, all I asked for. I have never taken an interest in anything -- in any mine examination that I've ever made.

George E. Hogg was 82 at the time of trial. His reports were written in 1930, 1940 and 1942, about a quarter of a century ago. His reports were delivered to the company and became a part of its business records.

Records made in the regular course of business are not hearsay.

28 USC §1732. (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

In the light of the record the court may wish to correct the impression that Mr. Hogg's testimony was hearsay.

The court went on to say: "Even if I assume that Champion's panning estimates were business records, and thus admissible in evidence, those estimates, on their face, are not sufficient to establish the claim." App. p. 13

Thus the question: Is the discovery of a block of 18,600 tons of cinnabar ore containing 5.2 pounds of mercury per ton - averaging approximately \$20.00 per ton of cinnabar ore - a discovery as a matter of law?

As a matter of law, the Department determined in Woodard and Belisle that ores of the approximate value per ton as here were sufficient discovery. Both of these cases show circumstances under which a discovery was established.

In United States v. Woodard, Oregon Contest 172, 173 (1957) set out in the Record at p. 328, it was held:

"In regard to the Sampson claim, more substantial evidence of mineralization was found. Three out of four mineral examiners found assay values from \$4 per ton for a 50 inch sample to \$28.29 per ton for a 10 inch sample (Table A) in a vein structure with both width and consistency. I conclude that the evidence of mineralization is sufficient to justify the belief that there is a reasonable prospect of success in developing a valuable mine on this claim and that there has been a valid discovery. Accordingly, the Sampson, together with the Fraction Amended and Luckey Strike are declared valid lode mining claims."

In United States v. Belisle, Colo 034358 (1966), a case under the Surface Resources Act, set out in the Appendix p. 143, it was held:

"Mr. Roberts testified that ore having a value of \$20 a ton is a working proposition. The sample taken from the Black Dragon by Mr. Belisle in 1965 from near the surface contained minerals of considerably higher value than \$20 a ton. The sample taken from the Black Jack claim in 1950 showed values of \$49.90 per ton. Add to this evidence the evidence of the mineral exposed in the workings underneath the Black Jack and it is clear that the mining claimant has successfully refuted the prima facie case presented by the Forest Service."

"The 'prudent man' rule as expressed in Castle v. Womble, 19 L. D. 455 (1895) is that a valid discovery of mineral has been made where the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. In the present case, the evidence shows clearly that this test has been met, indeed exceeded, by the mining claimant."

The Trial Examiner found that "Ore Reserves were developed as reported on p. 24, Exhibit "J". Specifically a block of ore $\frac{155 \times 18 \times 80}{12} = 18,600$ tons of 5.2 lbs. per ton, p. 24, Exhibit "J". See p. 12 of this Brief. His findings should not be disturbed.

The substantiality of the evidence rule applied in administrative proceedings is not the same as a scintilla of evidence rule which prevails in Oregon. No rebuttal was offered to dispute Hogg's testimony about the standard procedure for determining quantities of mercury in samples of cinnabar ore.

Moreover, the examiner had opportunity to observe the witness, his demeanor and manner, when testifying. Mr. Hogg's difficulty in remembering events of many years ago should not be seized upon as a substitute for agency finding contrary to his uncontradicted evidence. Agency assumption cannot be made a substitute for substantial evidence to support an agency finding.

Bound, as we are by the record, the court may find it proper to correct the decision of the court below affirming these administrative errors.

V

SINCE THE CONTESTANT DID NOT PLEAD NOR PROVE A PRIMA FACIE CASE BY SUBSTANTIAL EVIDENCE AS TO EACH OF THE CLAIMS CONTESTED, THE COURT BELOW SHOULD HAVE CORRECTED THIS ADMINISTRATIVE ERROR IN FAILING TO DISMISS THE CASE, AT LEAST AS TO TWENTY-ONE CLAIMS WHICH WERE NOT SAMPLED.

Since there was no complaint, there was no pleading. There was no pleading to inform the mining claimant that the Government intended to try 22 cases, i.e., whether discovery had been made on each of the 22 claims. We have found no precedent to justify the procedure followed by the Department in this case, and we submit that there is none.

If the agency intends to challenge each of the 22 claims, the mining claimant should be put on notice of the issue as to each claim by a complaint. For example, in Coleman v. United States, 363 F 2d 190, 203 (9th cir 1966), the court held that if the good faith of the applicant is in issue, the applicant for patent should be put on notice of the issue by the contest complaint.

The agency has the burden of proof. The Administrative Procedure Act provides, 5 USC §1006 (c), that "the proponent of a rule or order shall have the burden of proof". This statute places the burden of proof on the Government; at least the Government has the burden of establishing a prima facie case by substantial evidence as to each of the 22 claims.

The agency did not carry its burden of proof and did not establish the prima facie case by substantial evidence. The Secretary admits this. He said that the Government was not able to present evidence as to each of the 22 claims separately. R 291. He was mistaken in holding that it was not necessary for the Government to make out a prima facie case of lack of discovery as to each claim.

The Supreme Court discussed the substantial evidence required to support an administrative decision in Universal Camera Corporation v. N.L.R.B., 340 U.S. 474, 478, 487, 488 (1951) Mr. Justice Frankfurter deplored the

tendency of the courts to interpret the substantial evidence rule as requiring courts to affirm an administrative decision if the evidence favorable to that result was "substantial" when considered by itself. He stressed the requirement of the Administrative Procedure Act that the whole record before the administrative agency must be scrutinized by the reviewing court and that the evidence supporting the administrative decision must be considered in the light of whatever fairly detracts from its weight. When tested in the light of the substantiality of evidence rule, the evidence presented by the contestant falls far short of being a prima facie case. An agency order cannot be supported by a mere scintilla of proof. Interstate Commerce Commission v. Union P. R. Co., 222 U. S. 541, 32 S Ct. 108, 56 L. ed. 308.

There is no substantial evidence supporting the administrative finding of lack of discovery. Neither of the two witnesses called by the Government on the issue of mineral discovery expressed an opinion as to whether or not a prudent man would be justified in spending time and money on the claims with a reasonable prospect of success in developing a valuable mine. Mr. Holmgren testified that he had no experience with cinnabar. Tr 37. His samples were all iron stained, weathered basalt and were not cinnabar. He did not know the name of the formation. Tr 22. He admitted that he was not qualified to interpret the map and structural conditions shown in the U. S. Geologic Survey Bulletin Exhibits A and B, Report on Geophysical Survey of the Johnson Creek Area, Ochoco Quicksilver District, by G. D. Bath and K. L. Cook, Tr 21. According to Exhibit 1, Mr. Holmgren took four samples of the country rock on the Lost Mine Claim and none on the other claims. Mr. Shirley was on the claims, but

he took no samples.

Administrative orders are void if the finding is contrary to the indisputable character of the evidence. Interstate Commerce Commission v. Louisville & N. R. Co., 222 U.S. 88, 33 S Ct. 185, 87 L ed. 431. Southern R. Co. v. Virginia, 290 U.S. 190, 54 S Ct. 148, 78 L ed 260. Hence an agency order based upon evidence which clearly does not support it is an arbitrary act, against which courts afford relief. Northern P. R. Co. v. Department of Public Works, 268 U.S. 39, 45 S Ct. 412, 69 L Ed. 836.

We submit that the sampling of country rock on the Lost Mine Claim was not substantial evidence of want of discovery there, but even if the Government's evidence as to that claim were to be considered as a prima facie case as to that one claim, then at least as to the 21 claims which were not sampled, the agency case certainly should have been dismissed.

VI

SINCE THE CONTESTANT DID NOT PLEAD AND PROVE THAT THE BOUNDARIES OF EACH OF THE CLAIMS HAD NOT BEEN MARKED WHEN LOCATED IN 1929-1932, THE ABSENCE OF MARKERS THROUGH NO FAULT OF CLAIMANT IN 1962, DOES NOT CAUSE A FORFEITURE OF THE CLAIMS, AND THE COURT ERRED IN FAILURE TO CORRECT THIS ADMINISTRATIVE ERROR.

There is no pleading alleging, no proof establishing that the claims were not marked on the ground when they were located in 1929-1932. Contestant makes no least contention that the claims were not marked properly when they were originally located. But the contention is made that the failure to maintain the markers in 1962 when the claims were visited by the government examiners caused a forfeiture of the claims.

The statute, 30 USC §28 provides that "the location must be distinctly marked on the ground so that its boundaries can be readily traced" and that the claim must be "located by reference to some natural object or permanent monument as will identify the claim".

A location requires two acts: a discovery and a marking of the boundaries. Cole v. Ralph 252 U.S. 286, 296 (1929). When the discovery is made and the boundaries are marked, the locator's right to the ground embraced within his claim is vested. His rights are not divested by the disappearance or obliteration of his markers. Book v. Justice Mining Co., 58 F 106 (1893); Jupiter Mining Co. v. Bodie Consolidated Mining Co., 11 F 666 (CC Cal 1881); Moore v. Steelsmith, 1 Ala. 121 (1901); Bender v. Lamb, 133 Cal. App. 348, 24 P 2d 208 (1933) cert den. 291 U.S. 662; Nichols v. Ora Tahoma Mining Co., 62 Nev. 343, 151 P 2d 615 (1944); Steele v. Preble, 158 Or. 641, 77 P 2d 418 (1938).

The locator is not divested of his claim when his markers are obliterated due to the lapse of time Larned v. Dawson, 90 F Supp. 14 (D. Alaska 1950) (40 years lapse of time). Nor is the locator divested of his title when the markers disappear through the act of a stranger. Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co., 125 F 409 (1903). A mining claimant has no duty to keep his markers in repair or to maintain them. Bender v. Lamb, supra.

The Secretary's decision holding that a mining claimant must maintain his boundary markings for the benefit of agency engineers imposes a

non-statutory requirement upon a mining claimant. It is a departure from settled law. The statutory provision that the administrative execution of our public land laws is to be under the supervision and direction of the Secretary of the Interior does not clothe him with any discretion to enlarge or curtail the rights of mining claimants under the laws or to substitute his judgment for the will of Congress as manifested by a congressional act.

Payne V. Central R. R. Co. 255 U.S. 228, 41 S Ct. 314, 65 L Ed 598.

Actually the Government's examiners were able to determine, and did determine, the boundaries of each claim by reference to a section corner--a permanent monument as will identify the claims. Compare the claim map prepared by Mr. ~~Holmgren~~ with the claim map prepared by Mr. Hogg. ie Exhibit 1 with Exhibit "G". Both maps show the boundaries of each claim and both are the same as to the boundaries of each claim.

Therefore since there was no pleading or proof that the claims had not been marked when located 1929-1932, the absence of markers in 1962 does not cause them to be forfeited.

VII

SINCE THE HEARING EXAMINER SIGNED A NOTICE OF HEARING ASSERTING THE CHARGES AT THE DIRECTION OF THE PROSECUTING AGENCY THE COURT BELOW FAILED TO CORRECT THE ADMINISTRATIVE DECISION HOLDING THAT THE EXAMINER WAS NOT DISQUALIFIED UNDER THE ADMINISTRATIVE PROCEDURE ACT, 5 USC §1004(c).

The Administrative Procedure Act specifically forbids the Hearing Examiner from acting under the direction of those engaged in the prosecuting function. The court below erred in equating the notice of hearing, to a pre-

trial order because a pretrial order contains a statement of the contentions which each party proposes to prove. The notice of hearing signed by Examiner Holt presents the charges asserted at the request of forestry, the prosecuting agency.

A hearing examiner shall not be subject to the "...direction of any officer, employee, or agent engaged in the performance of investigating or prosecuting functions for any agency". (Underscoring supplied). 5 USC 1004 (c). This clear command forbids a hearing examiner from acting under direction of those engaged in the prosecuting function, and representing "any agency" in the "prosecuting function".

Section 613 (a) of the Surface Resources vests in Forestry the power to investigate and to initiate a prosecution against mining claims and their owners. Forestry had the right to request Interior to hear and determine the validity of title to mining claims under Section 613 (c). But when these provisions are read in connection with the Administrative Procedure Act, it becomes clear that a hearing examiner is disqualified from acting as an examiner when he acts under the direction of Forestry, which is engaged in the investigative and prosecuting functions. 5 USC 1004 (c).

The House Committee on the Judiciary, House Report No. 1980, May 3, 1946, when considering the Administrative Procedure Act, commented that when the same men are obliged to serve both as prosecutors and judges: "This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings,

which the Commissioner, in the role of prosecutor, presented to itself."

U.S. Code Cong. and Adm. Service, 79th Cong., 2d Session (1946).

When the examiner gave notice of the charges asserted by Forestry at the direction of Forestry, he was doing the very thing that is prohibited by the Administrative Procedure Act. Since the Hearing Examiner disqualified himself under the Administrative procedure Act from hearing the case, the proceeding is a nullity. The District Court erred in upholding administrative action denying mining claimant's motion for change of hearing examiner.

CONCLUSION

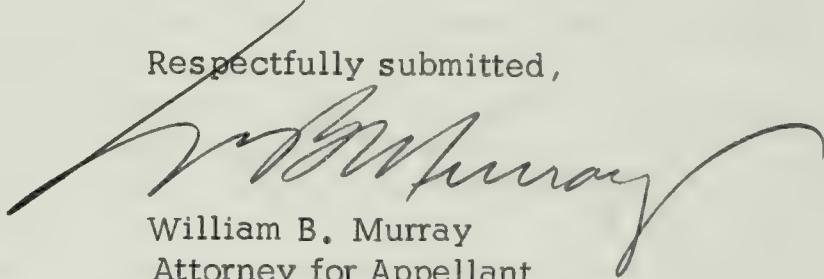
When Congress delegates administrative power and spells out the procedural safeguards under which that power may be exercised, then it would seem desirable that our courts should enforce those safeguards.

The expertise of the courts qualifies them better to decide law with respect to property rights. Since titles to mining claims are made to depend upon the acts of location, it would seem important for our courts to correct all administrative attempts to depart from the established law.

The Administrative Procedure Act applies to all delegations of administrative power and its purpose is to establish standards of fair dealing with citizens in an ever increasingly powerful bureaucracy.

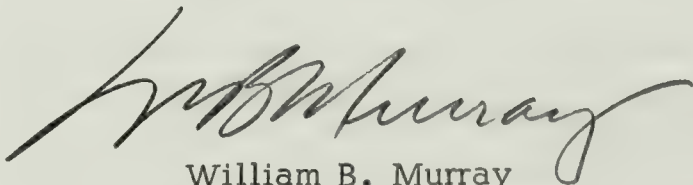
For the foregoing reasons , we respectfully submit that the decision of the court below should be reversed.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'W B Murray', is written over the typed name and address.

William B. Murray
Attorney for Appellant
525 Failing Building
Portland, Oregon 97204
226-3819

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A smaller, stylized handwritten signature in black ink, appearing to read 'W B Murray', is written over the typed name and title.

William B. Murray
Attorney for Appellant

SURFACE RESOURCES ACT - 30 USC §613 (a) , (c) , (e)

SECTION 613. PROCEDURE FOR DETERMINING TITLE UNCERTAINTIES--
NOTICE TO MINING CLAIMANTS; PUBLICATION; SERVICE

(a) The head of a Federal department or agency which has the responsibility for administering surface resources of any lands belonging to the United States may file as to such lands in the office of the Secretary of the Interior, or in such office as the Secretary of the Interior may designate, a request for publication of notice to mining claimants, for determination of surface rights, which request shall contain a description of the lands covered thereby, showing the section or sections of the public land surveys which embrace the lands covered by such request, or if such lands are unsurveyed, either the section or sections which would probably embrace such lands when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument.

The filing of such request for publication shall be accompanied by an affidavit or affidavits of a person or persons over twenty-one years of age setting forth that the affiants have examined the lands involved in a reasonable effort to ascertain whether any person or persons were in actual possession of or engaged in the working of such lands or any part thereof, and, if no person or persons were found to be in actual possession of or engaged in the working of said lands or any part thereof on the date of such examination, setting forth such fact, or, if any person or persons were so found to be in actual possession or engaged in such working on the date of such examination, setting forth the name and address of each such person, unless affiant shall have been unable

through reasonable inquiry to obtain information as to the name and address of any such person, in which event the affidavit shall set forth fully the nature and results of such inquiry.

The filing of such request for publication shall also be accompanied by the certificate of a title or abstract company, or of a title abstractor, or of an attorney, based upon such company's abstractor's, or attorney's examination of those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in said request, setting forth the name of any person disclosed by said instruments to have an interest in said lands under any unpatented mining claim heretofore located, together with the address of such person if such address is disclosed by such instruments of record. "Tract indexes" as used herein shall mean those indexes, if any, as to surveyed lands identifying instruments as affecting a particular legal subdivision of the public land surveys, and as to unsurveyed lands identifying instruments as affecting a particular probable legal subdivision according to a projected extension of the public land surveys.

Thereupon the Secretary of the Interior, at the expense of the requesting department or agency, shall cause notice to mining claimants to be published in a newspaper having general circulation in the county in which the lands involved are situate.

Such notice shall describe the lands covered by such request, as provided heretofore and shall notify whomever it may concern that if any person claiming or asserting under, or by virtue of, any unpatented mining claim heretofore located, rights as to such lands or any part thereof, shall fail to

file in the office where such request for publication was filed (which office shall be specified in such notice) and within one hundred and fifty days from the date of the first publication of such notice (which date shall be specified in such notice), a verified statement which shall set forth, as to such unpatented mining claim--

Hearings

(c) If any verified statement shall be filed by a mining claimant as provided in subsection (a) of this section, then the Secretary of Interior shall fix a time and place for a hearing to determine the validity and effectiveness of any right or title to, or interest in or under such mining claim, which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, which place of hearing shall be in the county where the lands in question or parts thereof are located, unless the mining claimant agrees otherwise. Where verified statements are filed asserting rights to an aggregate of more than twenty mining claims, any single hearing shall be limited to a maximum of twenty mining claims unless the parties affected shall otherwise stipulate and as many separate hearings shall be set as shall be necessary to comply with this provision. The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States. If, pursuant to such a hearing the final decision rendered in the matter shall affirm the validity and effectiveness of

any mining claimant's so asserted right or interest under the mining claim,

Failure to deliver or mail copy of notice

(e) If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person or as to the rights asserted by that person and the failure of that person to file a verified statement, as provided in such notice, shall in no manner affect, diminish, prejudice or bar any rights of that person. July 23, 1955, c. 375, §5, 69 Stat. 369, amended June 11, 1960, Pub. L. 86-507, §1 (26), 74 Stat. 201.

CODE OF FEDERAL REGULATIONS TITLE 43 CHAPTER 1 SUBPART C
CONTESTS AND PROTESTS JANUARY 1, 1962

SUBPART C---CONTESTS AND PROTESTS¹

PRIVATE CONTESTS AND PROTESTS

Section 221.51. By whom private contest may be initiated. Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land or who seeks to acquire a preference right pursuant to the act of May 14, 1880, as amended (43 U.S.C. 185), or the act of March 3, 1891 (43 U.S.C. 329), may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceed-

¹/ In addition to the material under this heading, the general provisions under Subpart D of this part should be consulted.

ing will constitute a private contest and will be governed by the regulations in this part.

Section 221.52. Protests. Where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances

Section 221.53. Initiation of contest. Any person desiring to initiate a private contest must file a complaint in the land office which has jurisdiction over the land involved, or, if there is no such land office, in the Office of the Director, Bureau of Land Management, Washington 25, D.C. The contestant must serve a copy of the complaint on the contestee not later than 30 days after filing the complaint and must file proof of such service, as required by §221.95, in the office where the complaint was filed within 30 days after service. [Circ. 2068, 26 F.R. 10479, Nov. 7, 1961]

Section 221.54. Contents of complaint. The complaint shall contain the following information, under oath:

- (a) The name and address of each party interested, including the age of each heir of any deceased entryman.
- (b) A legal description of the land involved.
- (c) A reference, so far as known to the contestant, to any proceedings pending for the acquisition of title to, or an interest in, such land.
- (d) A statement in clear and concise language of the facts constituting the grounds of contest.
- (e) A statement of the law under which contestant claims or intends

to acquire title to, or an interest in, the land and of the facts showing that he is qualified to do so.

(f) A statement that the proceeding is not collusive or speculative but is instituted and will be diligently pursued in good faith.

(g) A request that the contestant be allowed to prove his allegations and that the adverse interest be invalidated.

(h) The office in which the complaint is filed and the address to which papers shall be sent for service on the contestant.

(i) A notice that unless the contestee files an answer to the complaint in such office within 30 days after service of the notice, the allegations of the complaint will be taken as confessed. [Codification: In §221.54, the last sentence reading as follows: "If the complaint does not meet each of these requirements, it will be summarily dismissed." was deleted by Circular 1962, 21 F. R. 7622, Oct. 4, 1956.]

Section 221.58. Service. (a) The complaint must be served upon every contestee. If the contestee is of record in the land office, service may be made and proved as provided in §221.95. If the person to be served is not of record in the land office, proof of service may be shown by a written statement of the person who made personal service, by post-office return receipt showing personal delivery, or by an acknowledgment of service. In certain circumstances, service may be made by publication as provided in §221.60.

Section 221.64. Answer to complaint. Within 30 days after service of the complaint or after the last publication of the notice, the contestee must file in the office where the contest is pending an answer specifically meeting

and responding to the allegations of the complaint, together with proof of service of a copy of the answer upon a contestant as provided in §221.95. The answer shall contain or be accompanied by the address to which all notices or other papers shall be sent for service upon contestee.

Section 221.65. Action by Manager. (a) If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing.

Section 221.68. Proceedings in Government contests. The proceedings in Government contests shall be governed by the rules relating to proceedings in private contests.

ADMINISTRATIVE PROCEDURE ACT

5 USCA §1004 (c). Authority and functions of officers and employees.

(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in

that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

5 USCA §1005 (b). Issuance of process; investigations; transcript of evidence.

(b) No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

5 USCA §1008 (a). Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.

In the exercise of any power or authority--

(a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law....

5 USCA §1009 (c). Acts reviewable.

(c) Every agency action made reviewable by statute and every final

eral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. (R.S. §2322.)

MINING CLAIMANT'S EXHIBIT J

LETTER OF TRANSMITTAL

Mr. George Dreis, Secretary,
Independent Quicksilver Company,
712 Swetland Building,
Portland, Oregon.

Dear Sir:

I herewith submit a brief report of your Company's holdings, having gained the following information while in your employment, directing the exploratory and drilling operations at your property since June, 1939, to the present time.

The report consists of twenty-five pages and five plates. It has been prepared in quadruplicate, one original and three copies have been delivered to you.

Very respectfully submitted,

(Sgd)

George C. Hogg

LOCATION, ACREAGE AND CLIMATE

The Independent Quicksilver Company's property consists of 22 lode mineral claims, held by location, situated in Section 17, 20 and 21, T. 14 S., R. 20 E., Willamette Meridian, Ochoco Mining District, Ochoco National Forest Reserve, Lookout Mountain, Crook County, Oregon. The mineral holdings consist of the following lode claims and are shown on Plate I:

Princess	Eastern Star
Commodore	Greenback
Bonanza	Happy Chance
Zero	Grub Stake
Cornucopia	Astac
Jewel	Crystal
Ajax	Ruby
Good Luck	Pioneer
New Era	Prospect
Lost Mine	Aetna
Cosmopolitan	Columbia

These claims, comprising approximately 440 acres, adjoin the Mother Lode Mine Claims on the north, and are located in the northwest portion of the Round Mountain Quadrangle on the steep rugged north slope of Lookout Mountain at an approximate elevation of 5700 to 5200 feet above

sea level, about three miles north of Lookout Mountain Forest Rangers' Observation Station.

Prineville, a town of about three thousand inhabitants, on the City of Prineville railroad, a connecting branch line to the nearest railroad point and postoffice thirty-seven miles west of the property.

The property is reached from Prineville over the Prineville-Mitchell Highway No. 28 by means of automobile or motor truck to the Ochoco Forest Rangers' Station and CCC Camp, a distance of twenty-eight miles, thence over an easy grade, good Forest-Service road, a distance of nine miles, the last mile of which the grade is quite steep. This road is and can be negotiated the entire year if the snow is kept plowed off during the winter months.

The climate is delightful in summer and fall, days are warm and nights cool, the winters are not too severe, the temperature ranging this year (1939-40) from 36 degrees above zero to zero for the months of November, December, January and February.

Rainfall is limited in the summer months, there being frequent rains during the early spring and occasional rain in early fall.

The first snow generally falls around the first of October but does not last long. Snowfall is more or less excessive and comes to stay about December fifteenth. It lies on the ground until about April fifteenth, except in drifts, where it lasts until May fifteenth or later. The depth of snow this year was three and a half feet. This is a lighter fall than normal; however,

it is believed that substantial operations can be carried on continuously the entire year with only minor handicap on account of snow and cold weather.

The present mine camp consists of two (fully equipped, running water, etc.) 15' x 30' cabins, which can accomodate ten men. One of these cabins at the present time is used for a mess-hall, in conjunction with sleeping quarters; also, there are several sheds and a 15' x 9' workshop.

Abundant water for domestic purposes is available at the present mine campsite from springs on the property. Additional water necessary to operate a reduction plant can be easily developed from these springs (which are amply protected by water rights) and seepage from mine workings. Also, sufficient water can be developed on either Canyon or Johnson Creeks to install a small power plant to generate electricity for power and lights for mine and plant operations as well as camp purposes, if thought desirable.

GEOLOGY AND ORE GENESIS

The Independent Quicksilver Company's property is located in the northwest portion of the Round Mountain Quadrangle and, since the geology of this district has been so ably and graphically described by W. D. Wilkinson in the State of Oregon Department of Geology and Mineral Industries' recently published bulletin (a copy of which is hereto attached to this report), no attempt will be made to go into the geology of the district other than to bring about the significance of the salient points which are pertinent to the Company's holdings.

Quicksilver occurrences are definitely associated with volcanism.

The geologic history of the region is one of volcanic origin, beginning with the Clarno formation (basalts and andesites) of the Eocene, in which the cinnabar deposits of the district most uniformly occur, and continuing until late Pliocene or early Pleistocene period.

This volcanic activity produced stresses and strains, causing the faults and folds found in the older formation, and resulted in a wide variety of igneous rocks being distributed throughout the district. Intrusive rocks are not uncommon since the older formations are cut by dikes and plugs of younger rocks.

One of the major zones of mineralization of the district extends from the base of Lookout Mountain, approximately N 60 degrees E to Johnson Creek, traversing the Mother Lode, Independent, Devilsfood, Homestake, Mercury, Number I, Central Oregon and Wesserling properties.

In this zone there are a series of faults striking approximately N 62 degrees E. N 45 degrees E, N 20 degrees E, and N 10 degrees E. Movement along these faults produced shear zones along which mineralization is concentrated at these fault intersections and in the gouge occurring at these intersections.

In the early Tertiary period, the intrusions, closely following the Clarno lavas, were heavily charged with mineralized solutions, which, under favorable conditions, resulted in the precipitation of cinnabar in the Clarno formation.

The mineralization encountered to date at the Independent Quick-silver Company's property appears to be in the Clarno andesites. The few places that basalt has been observed, the andesite has been so tightly fused with the basalt that the point of contact has been hard to determine, thus permitting no chance for mineralization along this contact, and indicating that only a short period of time elapsed between the two lava flows.

The most important fracturing of the older country rock is along a line approximately N 62 degrees E. These fractures occur in a parallel series, spaced from a few feet to hundreds of feet apart. For the most part they are filled with igneous material and can be termed dikes. These dikes are andesite and can be distinguished from the older country rock through which they penetrated as they are more crystalline. In width they vary from a few inches to a hundred feet or more.

There seems to be contact metamorphism, for beyond the walls of the dike for many feet the andesite country rock is considerably altered, the original components of which it was composed have been altered chemically, by the heat from the intruding material of the dike and other agencies. The altered andesite near the dike walls by reason of this alteration is, therefore, susceptible for mineral impregnation or for leaching by acid solutions, and the consequent replacement of basic material by mineral held in the attacking solutions. Had there been no further activity in the district by chemical or igneous agencies no ore bodies would have been formed. Later, however, in the early Tertiary period, the crust of the earth surface was again broken

along an axis north and south (approximately N 10 degrees E). These fissures are represented by dikes running north and south. It is very probably that these north and south fractures are the channels through which quicksilver minerals in vapor or solution sought to reach the surface from a deep seated source. Where these fissures are filled with intruded lavas, there is evidence of contact metamorphism along the walls of the dike extending a few to many feet into the country rock, gradually fading out into unaltered materials as distances increase from the dike. The evidence seems to indicate that aqueous solutions carrying quicksilver rising through North and South vents, impregnated the altered andesite adjacent to the dikes and where these dikes intersected other dikes running N 62 degrees E, the solutions worked along their walls impregnating the altered andesite country rock.

NEIGHBORING PROPERTIES

The MOTHER LODE Mine, which adjoins the Independent Quicksilver Company's property on the south, was located as early as 1906. It was upon this property that the first discovery of quicksilver was made in the Ochoco District. The mine has been operated by several different companies, and has been known as the American Almedan, Consolidated Quicksilver, Cram Incorporated, and is now being operated by the Champion Mining Company.

The development at the property consists of several old tunnels, the Cram Swamp, Champion and Adit tunnels and crossouts, drifts, raises and stopes off these tunnels, all of which are now caved. Tunnel No. 4 and the

workings of this tunnel, most of which were driven during operations by the Cram Incorporated Company, are still open and accessible. In all, an excess of 3,000 feet of development work has been performed on the property, and approximately 5,000 tons of ore mined, from which possibly 500 flasks of quicksilver has been recovered.

During the regime of the Consolidated Quicksilver Company, under this name it is described in U. S. G. S. Bulletin 846A, what is known as the Swamp and Champion veins were discovered and opened up by the Champion and Adit tunnels, and it is from these veins that the major portion of the ore to date has been mined.

The deposition of the ore in the Champion vein or mineralized zone is mostly in the nature of stock work; seamlets of high grade cinnabar from the thickness of a knife blade to one or two inches or more, at various intervals, in places closely associated and at others one to two feet apart, occurring along and in fractures approximately N 10 to 20 degrees E, in the highly oxidized andesites in the upper workings and on the Adit and No. 4 tunnel levels in the hard unaltered Clarno andesites.

The Swamp vein more or less parallel and 100 feet East of the Champion vein is a highly altered clay gouge; in fractures in the altered andesite country rock, the cinnabar occurring in concentrated bunches, impregnated in the gouge in places and as small seamlets in others. Both of these veins or mineralized zone extend to and traverse the Independent Quicksilver Company's holdings.

During the operations of the Consolidated Quicksilver Company, the Champion vein was mined from the Adit tunnel level to the surface, the width of the commercial ore varied but averaged about one set wide, and while some of the ore was high grade, 25 pounds or better, the average was about 10 pounds per ton.

The Swamp vein was mined from the Swamp tunnel to the Surface, an approximate distance of 15 feet and from the Adit tunnel, 150 feet below the Swamp tunnel to 5 or 6 sets above said tunnel, when the stope was lost by a cave. This vein varied in width from two to fourteen feet, and in value from 2 to 30 pounds per ton (200 tons of which averaged 23 pounds per ton), However, the bulk of the tonnage mined before the stope caved in 1930, was of considerable lower grade.

When the Cram Incorporated took over the property, tunnel No. 4 (which had been started before the Consolidated Quicksilver Company discontinued operations in 1931) was continued and encountered the Champion vein on this level, 105 feet below the Adit tunnel, 431 feet from the portal of the tunnel. Stoping operations were subsequently started, one of which reached a height of six sets above the tunnel level when it caved, being 8 sets in length and one to two sets wide on the first floor. Some high grade was encountered in this stope, as is evidenced by ore of such grade being left along the hanging wall of the vein on the sill floor of the stope. The ore mined from this level was treated in the 15 ton Gould Rotary Furnace on the property, then as now, located below tunnel No. 4. No record is available

as to the tonnage treated by judging from the slag dump and the stope maps believe in excess of 2,000 tons must have been mined. Reliable source informs me that more than 150 flasks of quicksilver were produced from the ore treated.

During the operations of both the Consolidated Quicksilver and Cram Incorporated companies, the reduction plant was very inefficient and doubt exists if more than 50% of the values in the ore were recovered.

In the spring of 1939, the Champion Mining Company took over the property and opened up both the Champion and the Swamp veins on the surface, several hundred feet north of the workings by previous companies, by dozer excavations to depth of 10 to 15 feet below the surface. Subsequently, a series of tunnels were driven to cut the veins exposed in the surface cuts, first 20 to 30 feet below the dozer excavations and then alternately, 20 to 30 feet below each successive tunnel. Very favorable results have been obtained to date in most instances by this procedure. Ore of as high grade as 40 pounds has been mined. However, Mr. Champion advises me that the ore treated in the reduction plant averages 15 pounds to the ton.

Tunnel No. 4, which was caved in a few places, was cleaned out and retimbered, and the tunnel was being advanced to get beneath the good ore encountered in the old Adit tunnel in the Swamp vein. The property is equipped with a 15 ton Gould Rotary Furnace, having cast-iron and tile pipe condenser. It is operated by a 15 HP Fairbanks Morse engine. The plant, which was very inefficient, was remodeled under Mr. Champion's supervision, a sirocco dust precipitator and an additional tile condenser were installed so

that the plant now operates very efficiently.

Production the first of the year 1940 was at the rate of 2 flasks per day. This property should become a steady producer of quicksilver.

The Devil's Food Mine is a prospect, located on Johnson Creek about one mile northeast of the Independent Quicksilver Company's holdings.

The workings consist of a drift and cross-cut 150 feet, and 35 feet in length, respectively. A raise has been driven on the vein from the drift to the surface, a distance of 50 feet.

The vein occurs in and along a fault zone or fracture, which varies from 2 to 8 feet in width, striking approximately N 80 degrees E and dipping 70 degrees to 78 degrees S. The fault zone passes through both the coarse conglomerate and the fairly coarse grained basaltic country rock. Ore is found in both. The owner, W. Endicott, reports some ore of a very good grade has been encountered.

The Homestake Mercury Mine, which has been known as the Paulsen and Sayler, International Incorporated and Johnson Creek Mine, was located by W. Wesserling in 1929, and is located on Johnson Creek about 1-1/2 miles north east of the Independent Quicksilver Company's property.

The development consists of a glory-hole, open cuts, three tunnels, 125, 150 and 300 feet in length, respectively; and a shaft or winze sunk on the vein from the 300 foot tunnel to a depth of about 20 feet. A sample was taken by the writer at the bottom of the winze in 1931, which assayed 40.6 pounds per ton. All of the above mentioned workings are now caved and inaccessible.

The winze or shaft and old caved workings were for the most part driven along one of the major fault fractures of the district, trending N 62 degrees E and the ore occurs along fault fractures and fissures on both the hanging and the foot walls of the vein in a highly altered andesite or maybe rhyolite of the Clarno formation.

Some high grade, and considerable ore of a very good grade, was mined in 1930 and treated in a small 2- or 3-ton experimental external fired vertical furnace. This furnace proved a dismal failure, only 17 flasks being recovered from several hundred tons of ore treated. In 1931, 8 large D retorts were installed and operated during 1931-32, and with them, the production was brought up to 250 flasks.

Since 1933, there has been no production, though a crosscut tunnel is now being driven in a coarse grained basaltic rock, which shows no mineralization and little or no alteration, to cut the ore encountered in the winze, 80 feet below the bottom of the winze.

This mine has made a good showing for the amount of development performed. If amply financed and efficiently managed, this prospect should make a mine.

The Number One Mine is located about two miles northeast of the Independent Quicksilver Company's property, and adjoins the Homestake Mercury Mine on the east.

The development consists of a shaft 100 feet deep and several hundred feet of drifts and cross-cuts off this shaft at different levels.

Considerable ore of good grade is reported to have been mined from this

development. The ore was treated in a D retort with which the mine is equipped. About 50 flasks of quicksilver were recovered. These workings are now inaccessible, due to the fact that the shaft and workings are filled with water.

Recent work consists of a cross-cut tunnel cutting the major fault zone, trending N 60 degrees to 65 degrees E, dipping 70 degrees S, and a drift along this fault zone, in all about 300 feet of exploratory work. Ore of a good grade was found in places in the drift, particularly where the major fault was intersected by cross fractures trending N 12 degrees E. Also, a portion of the Company's holdings have been prospected by core-drill holes, the number of which, and the grade of ore encountered, are not known. It has been reported that the results of this work were very satisfactory. No operations are being carried on at this property at the present.

The Blue Ridge Mine, discovered by W. Wesserling, is located about 2-1/2 miles northeast of the Independent Quicksilver Company's holdings, and adjoins the Number One Mine on the West.

This property was formerly known as the Blue Ridge Mercury Company, Western Resources Incorporated, and at present the Central Oregon Quicksilver Company.

The development at the property consists of a large open cut, 100 feet or more in length, which is now partly filled with water and surface sluff, from which the ore was mined by a steam shovel during the first operations at the property. The ore occurred in a highly altered clay gouge in the

altered andesite country rock. It is of much the same character ore as that which occurs in the Swamp vein at the Mother Lode, about three miles southwest of this mine.

This vein is most likely in the same major fault fracture N 62 degrees E of the district as the Mother Lode, Independent Quicksilver, Johnson Creek, and Number One Mines' deposits occur. Operations were discontinued for a period, and later a shaft was sunk to the 100 foot level, and several hundred feet of drifts have been driven. Mining operations are now being carried on underground. It has been reported that very high grade ore has been encountered.

The first ore was treated in a 4 x 40 Allis Chalmers Rotary kiln, fed by a screw-feeder and driven by a 20 HP Fairbanks-Morse oil engine. Owing possibly to a too small cyclone dust precipitator and a very skimpy and inadequate tile pipe-condensor, the results were very unsatisfactory. Later, two ten-pipe banks of retorts were installed, and the ore now mined is treated in one series of these retorts. Production in the early part of last December was at the rate of one flask per day.

The Wesserling Prospect lies in a flat on Johnson Creek, a short distance southeast of the Blue Ridge Mine. No underground work has been performed, but the occurrence of cinnabar on the property has been traced in a northeast-southwest direction by panning and drilling. Mr. Wesserling reports that cinnabar showing, thus obtained, very good.

The above described properties all lie in the major fault fracture
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trending N 62 degrees E in the Clarno formation, from which the production (850 to 1,000 flasks) to date has been gained.

The Independent Quicksilver Company's property lies in the south central portion of this productive zone.

Numerous other properties in the district are described in the State of Oregon Department of Geology and Mineral Industries' Bulletin, hereto attached.

HISTORY AND DEVELOPMENT

In 1929 Richards and Conlin located ten claims which adjoin the Mother Lode Mine on the north, and in 1930 the Independent Quicksilver Company took over their holdings, and subsequently have added to them by location; so that at present, the holdings consist of twenty-two claims and substantial water rights.

Prior to the location of these claims by Richards and Conlin, and the Independent Quicksilver Company, some of the claims were evidently previously located, as is evidenced by old tunnels, pits, and cuts, which are now caved and filled, thus making inspection or examination impossible for this report.

In 1931, the Company carried on an extensive campaign of development, which consisted of numerous surface cuts, pits and trenches on many of the Company's claims, all of which are now either entirely or partly filled and caved. The report states that ore of a low grade was encountered in places. Also a tunnel was started on the Greenback Claim, the location of which is designated on Plate 1. This tunnel was subsequently continued in

the succeeding years , until 1934 , when it was discontinued , being 204 feet in length. This tunnel was started and has been driven for most of its length in a slightly altered to unaltered andesite of the Clarno variety , and three veins of 2 , 4 and 1 feet width , 36 , 76 , 126 feet from the portal of the tunnel , respectively , were encountered , samples from all of which assayed by the Oregon State Department of Geology and Mineral Industries showed trace of cinnabar. These veins will be prospected in depth with the Calox drill owned by the Company at a future date.

The face of the tunnel is in a hard black basalt , the contact of which with the unaltered andesite occurred 187 feet from the portal of the tunnel.

In 1937 , the Company decided to diamond drill their holdings by angle or cross-cut holes , with the idea of determining the mineralized area.

A contract was let to Jantsen Bros. , of Beaverton , and seven holes (5 on the Bonanza and 2 on the Zero) for a total footage of 831 feet were drilled. The greatest vertical depth obtained was 148.3 feet. The records show commercial ore of low grade was encountered in two holes.

In 1938 , the Company purchased an Ingersoll-Rand Calox drill. Four shallow holes , the location of which are shown on Plate 1 , 38 , 35 , 31 , and 92 feet in depth , respectively , for a total depth of 196 feet were drilled. The greatest vertical depth obtained was 35.0 feet. Commercial ore of low grade in two of the holes is on record in the logs. This is the extent of the development prior to 1939.

In June, 1939, what is known locally as the Champion and Swamp veins, from which the major production of the Mother Lode Mine has been derived, as well as a major fault fracture trending N 62 degrees E, in which the productive vein of the Johnson Creek Mine lies, were traced to the Independent Quicksilver Company's property. Surface cuts were excavated and pits sunk at various places and intervals on these mineralized fractures or zones on the Greenback, Bonanza, New Era and Happy Chance Claims, which, it was found, these veins or fractures traverse.

The Johnson Creek mineralized fractures trending N 62 degrees E were further opened up by dozer cuts A, C, D and F on the Bonanza, G on the New Era, and E on the Happy Chance Claim, as shown on Plates 1 and 2.

The surface soil was removed and the highly oxidized andesite country rock of the Clarno formation was penetrated to a depth of 5 to 8 feet.

Cut A, length 350 feet, width 10 to 11 feet, and depth 5 to 12 feet, was driven N 15 degrees E, across the major fault fracture trending N 62 degrees E. (as shown on Plates 1 and 2), exposing 25 feet of cinnabar-bearing rock of commercial grade. The location of the samples taken and the estimate value of which were arrived at by careful panning are shown on assay map, Plate 2.

Cut C, length 350 feet, width 10 to 11 feet, and depth 3 to 12 feet, was driven N 20 degrees W across the same fault fracture, 110 feet S 62 degrees W of cut A (as shown on Plates 1 and 2), exposing 20 feet of commercial ore. The location and value of samples taken are shown on Plate 2.

Cut F, length 550 feet, width 10 to 11 feet and depth 2 to 12 feet, was driven N 15 degrees W across the same fault fracture 75 feet S 62 degrees W of Cut C, and about 100 feet N 62 degrees E of the south boundary of the Company's holdings, exposing 15 feet of commercial ore. The location and values of samples taken are shown on Plate 2.

Cut D, 250 feet in length, 37 to 38 feet in width, 3 to 14 feet in depth, was excavated along the major fault fracture N 62 degrees E. from Cut C to 140 feet N. 62 degrees E. of Cut A, exposing commercial ore from Cut C to 100 feet N. 62 degrees E. of Cut A. The location and value of samples taken are shown on Plate 2. These 4 cuts, A, C, F and D tend to prove the continuity of an ore zone on the surface at least 15 to 25 feet in width and 285 feet in length, the distance between Cut F and a point 100 feet E. of Cut A. Pits 1 and 4, the location of which is shown on Plate 2, were sunk 3.5 feet below Cut D, the bottoms of both of which are still in the oxidized zone. Panning estimates of samples taken in the bottom of these pits were six pounds per ton. Pits 2 and 3, (location shown on Plate 2), were sunk 4 and 3.5 feet, respectively, below Cut D. Samples were taken in the bottom of these pits which are in an oxidized, highly altered, bluish gray andesite, the value of which was six and four pounds per ton, respectively.

Drill holes 18, 19, 20, the location of which is shown on Plate 2, the depth being 52.3, 140 and 130 feet with inclinations, of 45, 60 and 75, from the horizontal, respectively, were drilled S. 8 degrees E. across Cut D, passing directly under the East end of Pit 2-13, 35 and 75 feet, respectively, Exhibit J pp. 16-17

vertically below the south side of said pit. All of these holes showed mineralization to the extent of 4 to 7 pounds per ton for a width of 15 feet to a depth of 75 feet; vertically below bottom of Cut D in hole 20, the location and values of samples taken are shown on Plate 3.

Drill holes 21 and 22, located 25 feet N. 12 degrees E. of hole No. 20, as shown on Plate 2, the depth of which are 124.3 and 90.3 feet, with inclinations of 64 degrees and 49 degrees from the horizontal, respectively, were drilled S. 23 degrees E. across Cut D, passing under the center of Pit No. 1 and vertically below the south side of said pit. Both of the holes show mineralization to the extent of 2 to 5 pounds for a width of 15 feet to a depth of 85 feet, vertically below floor of Cut D. These two series of holes prove a body of low grade commercial ore 25 feet, the distance between the two series, in length, 15 feet in width and 80 feet in depth in one instance, as shown on Plates 4 and 5.

A tunnel will be driven as soon as weather permits to get beneath these ore zones at approximately 100 feet below the present floor of Cut D.

Drill holes 23 and 24, shown on Plate 2, are located 32 feet N. 20 degrees E. from hole 22, and were drilled at inclinations of 45 degrees and 60 degrees from the horizontal, respectively, S. 55 degrees E. across Cut D. While no commercial ore was encountered, the strong indications of cinnabar by the values of the samples panned, indicate that the mineralized zone is persistent, but barren of commercial ore, at this point along the line the holes cross-sectioned. However, the surface samples taken in Cut D showed low grade commercial ore vertically above these holes.

Holes 15, 16 and 17 were drilled, the location, direction, inclinations and depths of which are shown on Plate 2. None of these holes encountered cinnabar due to the fact that it has since been proven the ore-bearing fractures dip in a northerly direction, and as the holes were driven in a northeast direction, the holes passed under the mineralized zones.

Angle holes will be drilled to cut mineralization exposed in Pit 4 and the mineralized area in Cut F. All holes will be drilled along a line N. 62 degrees E. from Hole No. 24 every 100 feet with the view of proving the continuity length of commercial ore to be greater than has been proven by the holes drilled to date.

Cut G, length 550 feet, width 10 to 11 feet, depth 5 to 22 feet, located 500 feet N. 62 degrees E. of Cut D on the New Era Claim, was driven N. 40 degrees W. (as shown on Plate 1), across the same fault fracture as encountered in Cut D, upon which all the development described has been done. Another more or less parallel fracture 100 feet in width was cut 50 feet S. 40 degrees E. from the main N. 62 degrees E. fracture, separated from it by a dark gray andesitic dike. Commercial ore was encountered in both of these fractures, the location and value of which is shown on Plate 1. One five-foot sample of a greyish clay gouge, showing cinnabar in the last mentioned fracture, assayed 8.4 pounds per ton. This development seems to prove the continuity of the mineralized fracture 500 feet further east than Cut A. Both of these mineralized fractures in Cut G will be drilled as soon as the drill-hole development is completed in Cut D.

Cut E, length 200 feet, width 10 to 11 feet, depth 2 to 3 feet, was driven S. 40 degrees W. about 350 feet N. 62 degrees E. of Cut G. On account of excessive water, the rock in place was not reached. Therefore, it is not positively known whether the mineralized zone encountered in Cuts F, C, A and G extends this far past or not. A shaft will be sunk in this cut as soon as weather permits, to prove or disprove the existence of the major fault fracture as far east as this cut.

This is the extent of the development on the Johnson Creek Mine Fracture trending N. 62 degrees E.

Cut B, length 350 feet, width 10 to 11 feet, depth 3 to 12 feet, 250 feet S. 50 degrees E. of Cut D on the Bonanza Claim, the location of which is shown on Plate 1, was driven S. 35 degrees E. across a fracture parallel to the one previously discussed. This cut penetrated the oxidized andesite country rock about 3 feet, while traces of cinnabar were indicated in the pannings at various places, no cinnabar of commercial grade was encountered.

The Northerly extension of the Swamp Vein of the Mother Lode Mine is most likely what is known as the Greenback Vein on the Consolidated Quicksilver Company's holdings. This vein trending N. 12 degrees E. and dipping about 80 degrees S. was opened up by 5 surface trenches for a distance of 600 feet, thus proving the continuity of the vein on the surface for at least that distance from the development to date. The vein varied in width from 3 to 5 feet, and in value from 2 to 10.6 pounds per ton, the location

and value of which are shown on Plate 1, the cinnabar being impregnated in a yellowish white to bluish clay gouge in a fracture in the highly altered oxidized andesite country rock. This vein will be prospected in depth by drill holes, particularly beneath the sample which assayed 10.6 pounds per ton.

Pits have been sunk on what is presumed to be the Champion vein on the Company's holdings in various places, but no development has yet been performed.

SUMMARY

Cut A - 350 ft. in length	Bonanza Claim	600 cu. yds.
" B - 350 " " "	" "	450 cu. yds.
" C - 350 " " "	" "	350 cu. yds.
" D - 250 " " "	" "	3100 cu. yds.
" E - 200 " " "	Happy Chance	100 cu. yds.
" F - 550 " " "	Bonanza Claim	550 cu. yds.
" G - 550 " " "	New Era Claim	<u>2500</u> cu. yds.
TOTAL - - - - -		7650 cu. yds.

DRILL HOLES

DEPTH

14	102.0'
15	145.5'
16	69.0'
17	152.5'
18	53.5'
19	139.0'
20	130.5'
21	124.3'
22	90.3'
23	167.2'
24	180.0'
25	63.9'
26	<u>81.0'</u>

TOTAL - - - - - 1498.7'

TRENCH

GREENBACK

LENGTH

1	"	15'
2	"	10'
3	"	30'
4	"	35'
5	"	75'
6	"	30'
		<u>50'</u>

35 pits and postholes average depth 6 feet equal 210 feet on

Greenback, Commodore and Bonanza Claims.

The previously described work is the extent of the development to date.

RECOMMENDED DEVELOPMENT

While the probable ore developed by the exploratory work to date is sufficient for a year's operation of a 50-ton reduction plant, the following exploratory work is necessary to be performed to assure the continuous operation of the property:

<u>Location</u>	<u>Number Drill Holes</u>	<u>Total Footage</u>	<u>Cost Per Foot</u>	<u>Total Amount</u>
Pit No. 4	3	300	\$2.50	\$750.00
Cut F	3	300	2.50	750.00
100' East Hole #23	3	300	2.50	750.00
200' East Hole #23	3	300	2.50	750.00
Cut G	6	600	2.50	1500.00
100' West Cut G	3	300	2.50	750.00
200' West Cut G	3	300	2.50	750.00
100' East Cut G	3	300	2.50	750.00
200' East Cut G	3	300	2.50	750.00
Greenback Clain	<u>10</u>	<u>1000</u>	<u>2.50</u>	<u>2500.00</u>
TOTAL	40	4000	25.00	10000.00

On thousand feet Mine Development @\$10 per ft.	\$10,000.00
Bulldozer excavations for 24 days @\$32 per day	768.00
Equipment, Compressor, Jack-hammers, etc.	<u>4,232.00</u>
TOTAL	\$25,000.00

This program of drilling and tunnel exploratory work, drifts, cross-cuts, raises, etc., is subject to change as work progresses, depend-

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ing upon results obtained. The cost of mining and plant operation should not exceed \$4.00 per ton.

SAMPLING

Samples were taken in the dozer cuts A, C, F and G, by cutting a trench 2 to 3 inches in width and depth, respectively, in the center of the bottom of the cut, at 5-foot intervals. In Cut D, the trenches were cut across and up and down the cut at the same intervals. The location and values of samples taken are shown on Plates 2 and 5. These samples were panned, and values listed are panning estimates. Check assays were made frequently to ascertain and assure accuracy of these pannings.

In sampling the drill-holes, the wash water or sludge was saved and combined with the cuttings recovered in the upside down core barrel; the samples thus obtained from each run were panned to determine the value of the material passed through.

The lengths of the runs vary and the location and values of samples taken are shown on Plates 3 and 4. Portions of some of the sludge samples have been bottled and kept to be assayed. The core recovered has been carefully arranged in core-boxes and racked for future reference.

ORE RESERVES

The results of the development obtained to date by the dozer-cuts and drill-holes have proved a probable block of ore, shown on Plate 5, 285 feet in length on the surface (the distance between Cut F and a point 100 feet East of Cut A), and 25 feet in length (the distance between the bottom of the

two series of holes 18, 19, 20, 21 and 22, for an average length of 155 feet, 18 feet in width (the average width of commercial ore 20 feet on the surface, 16 feet at the bottom of holes 20, 21, and 80 feet depth (average depths of commercial ore encountered by holes 20 and 21, 75 and 85 feet, respectively).

Thus a block of ore $\frac{155 \times 18 \times 80}{12} = 18,600$ tons, having a value of 5.2 pounds per ton (the average value of the samples taken).

The cubical contents of one ton of ore has been considered 12 cubic feet for this calculation.

SUMMARY AND CONCLUSIONS

The following facts are to be considered:

Climatic and economic conditions are favorable for continuous operation the entire year and for low operating cost.

The geologic conditions are favorable for the deposition of quicksilver. The Company's holdings are located in a recognized mineralized area, in one of the major fault fractures trending N. 62 degrees E. from which an appreciable amount of quicksilver has been produced. Furthermore, the property is situated between the Mother Lode and Johnson Creek Mines, which have been the most productive mines along this fault fracture.

At least 3 mineralized (cinnabar-bearing) veins or fractures are known to traverse the property. Two of these, the Swamp and Champion veins from which the major productions of the Mother Lode Mine has been derived, have to date only been prospected by surface trenches, cuts, pits and short tunnel (a sample from which assayed 10.6 pounds per ton), to prove

the existence of these veins on this property.

A meagre amount of development (dozer-cuts and drill-hole exploration) or the third of Johnson Creek Mine Fracture has resulted in the development to date of a probable tonnage of 18,600 tons, having a value of 5.2 pounds per ton. While to date, only ore of a low commercial grade has been encountered the history of the other mines in the district has been, where this main fracture is intersected by cross-fractures, particularly those trending N. 12 degrees E., a good grade of and even high grade ore has been encountered. It is to be expected when the tunnel to be driven gets beneath the area reached by drill-holes 18, 19, 20, 21 and 22, that such intersections will have been encountered, which will open up ore of a much higher grade than heretofore has been exposed.

In view of the above facts, further development of the property to the extent recommended in body of report is warranted, with the confident expectation that positive ore of sufficient tonnage will be developed to keep the property in continuous operation.

Very respectfully submitted,

(Sgd) George C. Hogg

MINING CLAIMANT'S EXHIBIT L

Portland, Oregon,
November 6, 1932.

Mr. George Dreis,
Yeon Building,
Portland, Oregon.

Dear Sir:

In compliance with your request, I have made and completed a study of the property owned by the Independent Quicksilver Co. As my instructions were to examine this mining ground from a geological viewpoint with special emphasis on the ore occurrence, manner in which it was formed, and recommendations as to future prospecting, I have refrained from sampling and estimating quantities of low grade material now in sight. It is my opinion that any ore now developed on the property is of little consequence with the price of quicksilver below fifty dollars per flask of seventy-six pounds, therefore it is of the greatest importance to locate higher grade ore by systematic prospecting of favorable areas.

Your property consists of twenty-two mining locations unpatented, containing approximately four hundred and forty acres, within the boundaries of the Ochoco National Forest, Location 20, Township 14 South; Range 20 East. The elevation is about 6,000 feet, with considerable snowfall during the winter months, but mining operations can be carried on twelve months of the year. It is reached from Prineville via the Ochoco Highway twenty-six miles and thence nine miles along the Johnson Creek Highway, which is usually in excellent condition for heavy hauling. There is sufficient timber on the property for all mining purposes, and abundance of water during all seasons. Adjacent on the south lie the holdings of the Consolidated Mining Company, where the mining of cinnabar has continued more or less continuously for thirty years with possibilities as yet unexhausted and little depth attained. To the North lies the Number One Mining Co., Western Resources (Blue Ridge), Johnson Creek Mining Co., and several other rather promising prospects. As the belt of cinnabar mineralization extends north and south, it can be stated that the location of this property is very favorable for the occurrence of ore bodies.

In this district the country rock is of volcanic origin which can be classified as an andesite flow probably having walled up through vents along an axis approximately North 35 degrees West. Traversing this formation in various directions are fissures, intrusive dikes, and simple fractures, all belonging to a younger geological period of time. There has been found no evidence of cinnabar impregnation along the axis North 35 degrees West.

The most important fracturing of the country rock on the property is along a line approximately North 62 degrees East. These fractures occur in a parallel series, spaced from a few feet apart to hundreds of feet. For the most part they are filled with igneous material and can be termed dikes. These dikes are andesite also but being somewhat more crystalline, can be distinguished from the country rock through which they have penetrated. In width they vary from a few inches up to a hundred feet or more. There they cross the earlier fissures of the North 35 degrees West series, there is seemingly no displacement or faulting which is quite important to know. These dikes (N 62 degrees East) at their walls, show no fusion with the country rock through which they penetrated, indicating that at the time they were intruded, the country rock had cooled down, and that a long period of time had elapsed. There is evidence of contact metamorphism, far beyond the walls of the dikes for many feet the andesite country rock is considerably altered, the original compounds of which it was composed having broken down chemically into secondary compounds, a reaction caused by the heat from the intruding material of the dike and other agencies too complex to discuss here and having no bearing on the problem of finding ore. Suffice it to say that this altered andesite near the dike walls is in a condition by reason of this alteration, for mineral impregnation or for leaching by acid solutions and the consequent replacement of basic material by mineral held in the attacking solutions. Had there been no further activity in the district by chemical or igneous agencies, no ore bodies would have been formed. The situation would have been similar to a garden prepared for planting but before the seed had been placed in the ground. All conditions would be favorable but no crop would ensue.

Fortunately, nature did not stop her gardening at this point. Ages later the crust of the earth was broken once more, this time on an axis north and south (approximately North 11 degrees East). This action was probably about the time of the Cascade Mountain Uplift. This interesting period in the geological history of the Pacific Coast is outside our discussion except that the fracturing is extensive and occurred at a very much later date than the systems previously mentioned. These fissures are represented in the district by dikes running north and south, and sometimes merely by cracks in the country rock hardly noticeable. As they cross the dikes having a course North 62 degrees East, and also the ones having a course North 35 degrees West, they must necessarily be younger. The importance to our discussion lies in the fact that along this course north and south for a great many miles

there is a belt of mineralization with producing quicksilver mines and prospects lining up with remarkable accuracy. It is very probable that these north and south fractures are the channels through which quicksilver minerals in vapor or solution sought to reach the surface from a deep seated source, and that this mineralizing action occurred in comparatively recent times. Where these fissures are filled with intruded lava, there is evidence of contact metamorphism along the walls extending from a few to many feet into the country rock, gradually fading out into unaltered material as distance increases from the dike.

To complete the story of ore genesis, the evidence indicates that the aqueous solutions carrying quicksilver rising through north and south vents, impregnated the altered andesite adjacent to the dikes north and south, and where these dikes intersected other dikes running North 62 degrees East, the solutions worked along their walls also impregnating the altered andesite adjacent to their walls. It is apparent that if the spacing apart of these north and south fissures is sufficiently close, there could be almost continuous ore formed along the walls of the east and west dikes (North 62 East). Also, that if the north and south ore channels are not dike filled but simple fractures or knife blade seams, there would be no altered andesite along their walls and consequently no impregnation and no ore bodies formed, in which case the ore would be formed only along the walls of the east and west dikes which the north and south ore channels intersected. This indeed is borne out by the evidence. Some ore bodies in the district follow one course and some the other. On the property of the Independent Mining Company prospecting has been conducted at numerous spots over a large area by surface panning, open-cuts and short tunnels. In the main, this work has not been productive of results. It is my opinion that most of this work was done in altered andesite at too great a distance from intersections of the two systems of fracturing, their importance not being recognized. Also, since there must have been considerable dilution of an ore body near the surface by reason of erosion and the covering by overburden, the shallowness of recent prospecting would have prevented the discovery of important ore. The surface panning does indicate one very gratifying fact which is that cinnabar is present; also, since the areas of heaviest pannings follow roughly a north and south line, and there are at least two such lines crossing the property, it is apparent that the property is crossed by at least two of the main ore carrying channels previously discussed. It is along these lines that prospecting should be continued, with particular attention given to these points where these lines cross known east and west dikes. One of these north and south lines of mineralization extends from the southeast corner of the Bonanza claim, crossing the New Era, Happy Chance, Ruby, New Crystal, Prospect and Aetna claims. Another north and south line crosses the property, starting about two hundred feet east of the southwest corner of the Bonanza claim, crosses the Zero claim near the Hunsaker tunnel and shaft, Good Luck, Grubstake, Crystal, Prospect, Ajax and Aetna. To the south, on the property of the Consolidated Mining Company, these lines extended would hit very close to known ore bodies there.

On the Greenback claim there is a tunnel driven 204 feet southeast. I can see no object in extending this further, as ahead of the face there is no known mineralization at present to drive for. However, fifty feet in from the portal, a very well defined fissure crosses the tunnel on a course of North 11 degrees East. This fissure may turn out to be of great importance in developing ore at points where it crosses east and west dikes on both the Greenback and Lost Mine claims. A fourth fissure or series of fissures on a north and south line crosses the Cornucopia, Aztec and Jewel claims but very little is known about this except for some scattered pannings that look interesting.

I have attempted to discuss the genesis of ore in the district in a manner understandable by a layman, with the hope of bringing out essential points governing future prospecting. It is not claimed that the whole history of the ore occurrence is disclosed for there are many perplexing problems remaining to solve. It now is necessary to sum up our exact knowledge, as follows:-

CONCLUSIONS:

1. The geological conditions are present on this property which formed commercial cinnabar ore on nearby properties.
2. Failure to date in locating ore on independent ground is attributable to lack of knowledge of ore genesis, too unaltered prospecting, and the lack of a well defined policy and program.
3. Methods of prospecting were too slow.
4. Dikes both north, south, east and west traverse the property having altered andesite country rock on both walls favorable for impregnation by cinnabar or replacement. Points of intersection of these two series are likely ore zones and prospecting should be confined to these areas.
5. Pannings of surface soil or near the surface proves the presence of cinnabar. In some areas on the property such tests are almost rich enough to prove ore. There can be no doubt that ore channels traverse the property. It only remains to determine whether or not mineralizing activity has been sufficiently intense to make bodies of commercial ore.
6. It is my opinion that a surface capping to trap ascending vapors of quicksilver is not essential to the formation of cinnabar ore bodies in this district. There is definite evidence that aqueous solutions carrying quicksilver percolated freely through the formation and I believe the altered andesite adjacent to the dike walls would readily receive these solutions and be converted into ore by them.

7. It is very probable that the depth to which workable ore extends vertically is limited only by the depth to which surface waters penetrated before being converted into ascending solutions, carrying mineral from heat and mineral encountered. In a crust fractured so extensively, fifteen hundred feet is a reasonable expectancy.
8. Horizontally, ore bodies should have considerable length but this would depend on the spacing apart of cross fractures feeding them. It is probable that at some points ore when found will extend north and south as well as east and west, but this will be possibly only where there is dike filling in both series of fissures.
9. The surface values being diluted from erosion and mixed with overburden cannot, if unsatisfactory, prove the absence of important ore below the zone of such disturbances. Possibly core-drilling at favorable points is the quickest and best method to prospect this ground, each hole designed to disclose the formation at a depth not less than thirty feet below the surface.

It is my opinion that \$5,000.00 should be expended on this property to locate commercial ore. I judge the present indications of ore sufficiently attractive to warrant this expenditure. A program of development beyond this cannot be formulated now, as it will depend entirely on results obtained. A program of core-drilling for the spring of 1933, confined to the most favorable spots can be completed in a moderate way for this sum. The exact location of holes to be drilled cannot be stated at this time as considerable surface panning and analysis of the dike systems must be done first, in order to have drilling footage.

I wish to acknowledge the survey and mapping of geological features of the property by A. J. Hofmann which have been of great value to me.

Respectfully submitted,

(Sgd) H. F. BYRAM

MINING CLAIMANT'S EXHIBIT O

June 29, 1955

Mr. George Dreis
N. E. 37th Street
Portland, Oregon

Dear Sir:

1. I visited the Independent Quicksilver Company's property June 27 and returned June 28, as you said it was important that you had my report as soon as possible.
2. I found that all the recommendations in my report of May 15, 1942 had been completed.
3. The Nicols Tunnel was driven about 90 ft. and the overburden was about 1000 cu. yds. excavated by bulldozer. This tunnel was driven on the vein system of the Mother Lode property.
4. To explore the possibilities of the Independent property a tunnel should be driven from the falls north of the cabin to cut the talc or swamp vein opened by dozer excavation completed in 1941. This tunnel will encounter vein about 50 ft. under the vein exposed, then a crosscut should be driven east to cut the Onka vein and the mineralization in the Morris Tunnel. Hole #1 was drilled on the Onka vein in the fracture zone which assayed 8.6 lbs. This drill hole was logged and merchantable ore was encountered, also a crosscut was driven to get beneath the drill holes drilled in 1941, and some of the holes showed merchantable ore. This exploratory work indicates that the independent property is on the Johnson Creek fracture. This leads to the conclusion that the two systems of veins pass through the Independent property which should enhance the value of the Independent Company's property.
5. See U.S.G.S. Reconnaissance survey of 1947 and subsequent dates.

(SGD) George C. Hogg
George C. Hogg

MINING CLAIMANT'S EXHIBIT P

GEORGE C. HOGG
Consulting Mining and Civil Engineer
229 Lumbermens Bldg.
Portland, Oregon

October 29, 1930

Mr. Wm. T. Conlin, President
Independent Quicksilver Co.
801 Yeon Building
Portland, Oregon

Dear Sir:

I herewith submit preliminary report of the Independent Quicksilver Co's property, which has been written in duplicate, one original and one copy. A contour and geological map to accompany report has been delivered to you.

I am in no way financially interested in the Independent Quicksilver Company.

Yours very truly,

(Sgd) George C. Hogg

PRELIMINARY REPORT

The Independent Quick Silver Company property is located in Sections 17 and 20 Twp. 14 S. Range 20 E. Willamette W.M. Ochoco National Forest Reserve, Crook County, Oregon, in a recognized mineral district in which Cinnabar is the predominating mineral in this particular locality.

The discovery of Cinnabar within the last year in numerous places has caused considerable attention to be given to the district with the result that mining claims have been taken up for miles. In fact, there is very little ground open for location.

The Independent Quick Silver Company holdings (consist of 13 mining claims, approximately 250 acres) are ideally located in so much as the holdings join the Consolidated Quick Silver Mining Co. property on the north and are one mile southwest of the Johnson Creek Mercury Co. property.

The Consolidated Quick Silver Mining Co. has carried on over 2000 ft. of development and considerable ore has been blocked out. There is a 20 ton rotary furnace on this property, and considerable mercury has been produced.

The Johnson Creek Mercury Co. has carried on an extensive development program this summer and fall and considerable ore has been blocked out. A Hobson 5 ton retort has been in operation the last few months and some mercury has been produced. This company is in the process of installing a

6 tube D Retort to treat the high grade ore, and will be ready for operation within the next few months.

While only a limited amount of development has been carried on at most of the other claims in the district many of them have made especially good showing.

To date the development carried at the Independent Quick Silver Co. property is very limited in extent, mostly in the nature of location work, except a new tunnel on the Zero claim, which has been driven a distance of 25 ft. in the decomposed gray porphyry. Stringers of Cinnabar thruout the decomposed porphyry were encountered 20 ft. from the portal of the tunnel. Sample #12 was taken in the face of the tunnel. This tunnel is being driven at present.

A shaft was sunk on the Bonanza claim to a depth of 10 ft. Pan tests were made of the material taken out of the bottom of the shaft which showed appreciable Cinnabar. Sample #10 was taken from the bottom of the shaft. This shaft could be sunk 25 ft. deeper.

The old tunnel on the Greenback Claim was cleaned out. This tunnel has not been driven far enough east as yet to encounter the vein.

A test pit was sunk on the Greenback claim to a depth of 4 ft. The work being discontinued on account of excessive water. Pan tests of the material in the bottom of the pit showed appreciable Cinnabar. Sample #10 was taken in the bottom of this pit. Arrangements should be made to take

care of the water and this pit could be sunk 10 ft. deeper.

RECOMMENDATIONS

1. Advancing new tunnel on the Zero claim thru the decomposed gray porphyry dike as long as the dike carries Cinnabar.
2. Sinking of pit on the Greenback Claim until the vein is encountered in place. If results are favorable as far as encountering Cinnabar is concerned, then the old caved tunnel 75 ft. west of the pit should be cleaned out and the tunnel driven east to encounter the vein exposed in the pit. When the vein is encountered in the tunnel the vein should be drifted on north and south.
3. Test holes should be sunk along the creek on the Lost Mine claim to locate the vein encountered in the pit on the Greenback claim on its southerly extension.
4. Cleaning out of old tunnel on the Columbia claim and drifting both north and south on the vein, which report has it, is in the face of the tunnel.
5. Sinking of shaft on the Bonanza claim 25 ft. deeper.
6. Trenching on surface from andesite outcrop to porphyry with the idea of encountering a vein on the contact of porphyry and andesite.

CONCLUSION

The following facts should be considered:

1. The Independent Quick Silver Co. property is located in a

recognized mineral district, this particular locality predominating in quick silver.

2. The Independent Quick Silver Co. property adjoins the Consolidated Quick Silver Co. property on the south and is about 1 mile southwest of the Johnson Creek Mercury Co property, both of which have produced and will produce considerable quick silver.

3. Geologic conditions are favorable for the deposition of quick silver. The predominating formation being andesite and prophyry. The same formation exists on both the Consolidated Quick Silver Co. and the Johnson Creek Mercury Co. properties.

4. The economic and climatic conditions are favorable for cheap mining and continuous operations for the entire year.

5. The limited amount of development to date on the Independent Quick Silver Co. property has resulted in the encountering of Cinnabar in three places.

6. The price of mercury for the last four years have been in excess of \$1.40 per pound, and the indications are that this price will at least be maintained in the future, as the production in the United States is only about one-third of the actual consumption, and the demand for the metal is steadily increasing.

Based upon the significance of the above facts, the further development of the Independent Quick Silver Co. property to the extent of

\$25,000 is surely justified with the confident expectation that a producing Quick Silver property will be the result.

Respectfully submitted,

(Sgd) George C. Hogg

George C. Hogg

Consulting Engineer

Portland, Oregon, October 29, 1930

RESUME OF ASSAYS, INDEPENDENT QUICKSILVER CO.

Date	Sample No.	Location	Lab. No.	Tested By	%Hg	Lbs./Ton
6/30/31	1	East end of 7-1 1/2' trench east of andesite in #2	.....	A.J. Hofmann	0.095	
"	2	Soft streak of outcrop, 30" width; #3 west	.....	do	0.2	
"	3	Taken from contact of andesite & porphyry.				
"		This is outcrop. #2 West Side	.....	do	0.098	
"	4	#4 Cut Good Luck	.....	do	0.197	
"	5	Crushed rock porphyry	.....	do	Blank	
"	6	Altered andesite trench. East	.....	do	0.096	
7/3/31	7	Crushed porphyry, West trench	.....	A.J. Hofmann	Blank	
"	8	Broken down andesite, East trench	.....	do	0.04	
7/8/31	9	Drain pit	.....	A.J. Hofmann	0.4	
"	10	40' so. of no. end of long trench on porphyry cross dyke	.....	do	0.2	
"	13	From fissure in close end trench	.....	do	0.1	
"	15	Right side of Columbia tunnel	.....	do	0.2	
7/9/31	11	Nichols last digging	.....	A.J. Hofmann	0.1	
"	12	Honsaker tunnel	.....	do	0.1	
"	14	Left side Columbia tunnel	.....	do	0.1	
7/15/31	16	Auger hole in trench	.....	A.J. Hofmann	0.36	
"	17	Porphyry-andesite contact in trench	.....	do	0.64	
"	18	Crystal claim, bottom of hole	.....	do	0.6	
"	19	" " top of outcrop	.....	do	0.4	
"	21	Pioneer claim, drill hole ("Laugaard")	.....	do	0.1	
"	22	" " blast hole (test Hole")	.....	do	0.2	
"	20	Crystal claim, special sample	.....	do	0.4	
"	23	Auger hole	.....	do	Blank	
7/24/31	24	Red blanket vein between andesite dykes	.....	A.J. Hofmann	0.24	
"	25	Next to andesite intrusion in trench	.....	do	0.26	
"	26	Along southern wall between andesite dykes (Black ore)	.....	do	0.2	
"	27	Next to porphyry dyke in trench	.....	do	0.26	
"	28	Along northern end of trench between porph.	.....	do	Blank	
"	29	Drain trench, r.h. drift, 3' between two	.....		

Date	Sample No.	Location	Lab. No.	Tested By	%Hg	Lbs./Ton
7/29/31	16a	Auger hole	.....	A.J. Hofmann	0.2	
"	30	Extreme north end of Trench #1, bottom cut 6' long (where highgrade was found)	.....	do	0.4	
"	31	Crystal claim, slant hole, 13' in	.....	do	0.2	
"	32	" " 9' down vertical	.....	do	0.28	
"	32a	" " 18' down vertical (5' water)	.....	do	0.16	
"	33	Columbia tunnel, "Gouge streak center"	.....	do	0.32	
"	34	" " footwall	.....	do	0.7	
"	35a	Auger hole, Bonanza claim	.....	do	0.24	
"	35b	" " "	.....	do	0.24	
"	35c	" " "	.....	do	0.16	
"	35d	" " "	.....	do	0.36	
7/30/31	36	Crystal trench	.....	A.J. Hofmann	0.2	
"	36a	" "	.....	do	0.2	
8/7/31	35e	#4 trench near aspens, 15' long, 2-1/2' deep	.....	A.J. Hofmann	0.16	
5	36	Crystal trench 35' from stump	.....	do	0.2	
"	37	#3 trench, lower meadow	.....	do	0.12	
"	38	#1 trench, North end	.....	do	0.12	
"	39	Columbia dump	.....	do	0.2	
"	....	Commodore Frank's claim	.....	do	0.16	
8/28/31	40	Greenback claim, yellow mud between red clay streaks	1	A.J. Hofmann	0.07	
"	"	Northerly end trench, Greenback claim	2	do	0.08	
"	"	No. 1 <u>C</u> bottom trench, Greenback, red clay	3	do	0.08	
"	"	Bottom trench, Greenback, under red clay	4	do	0.04	
"	41	No. 3 trench, lower meadow southerly end, auger hole 15' deep	5	do	0.09	
"	49	#4 trench, easterly end	.....	do	0.09	
"	50	" " 40' from juniper tree north	.....	do	0.07	
"	51	Greenback tunnel, 2' from footwall, 8' high, 2' wide	.....	do	0.08	
"	52	Greenback tunnel, footwall, 3' wide, 3' deep	.....	do	0.06	

Date	Sample No.	Location	Lab. No.	Tested by	%Hg	Lbs./Ton
8/28/31	53	#3 Trench 50' back of face 7' deep	.....	A.J. Hofmann	0.07	
"	54	" " face 9' down	.....	do	0.05	
"	55	Greenback claim, northeast corner of pit	.....	do	0.09	
"	56	#4 trench, extreme s. e. end of trench near aspens, 3' down	.....	do	0.09	
8/31/31	57	#1 trench red streak	.....	A.J. Hofmann	0.12	
"	58	#4 trench, s. e. end, auger hole 7' deep	.....	do	0.08	
"	38?	#1 trench, northerly end, 7' down (recheck)	.....	do	0.11	
"		Grubstake trench, Laurgaard special	.....	do	0.06	
"		#16 Cut, auger hole	.....	do	0.05	
9/22/31	100	Greenback #1 trench, horizontal hole	.....	A.J. Hofmann	0.05	
"	101	Greenback #1 trench, footwall	.....	do	0.02	
"	102	" " hole with white streaks	.....	do	0.09	
"	103	" #2 " 2d sample	.....	do	0.06	
"	104	" " 1st sample	.....	do	0.10	
"	105	" #1 trench, footwall	.....	do	0.04	
"	106	Crystal claim, northeast end of outcrop	.....	do	0.08	
"	107	" " trench on top of "green rock"	.....	do	0.12	
"	108	Zero shaft	.....	do	0.08	
"	109	Hunsaker tunnel, face	.....	do	0.11	
"	110	" " red streak	.....	do	0.09	
"	111	Columbia tunnel, face	.....	do	0.06	
10/2/31	119	Crystal claim, mystery hole	.....	A.J. Hofmann	0.02	
"	120	" " northeast end of outcrop	.....	do	0.11	
"	121	Red conglomerate east of Lost Mine	.....	do	0.09	
"	122	Greenback tunnel Station No. 1	.....	do	0.12	
.....	112	30' west of conglomerate, Lost Mine claim	.....	A.J. Hofmann	0.06	
.....	113	Crystal claim float	.....	do	0.14	
.....	114	Outcrop, west end, Crystal Claim	.....	do	0.07	
.....	115	Columbia footwall, north drift	.....	do	0.07	
.....	116	Columbia hanging wall, north drift	.....	do	0.05	
.....	117	Columbia cross cut 6' from timbers	.....	do	0.06	
.....	118	Lost Mine Claim 50' west of conglomerate	.....	do	0.09	
10/12/31	509	Greenback tunnel face	.....	A.J. Hofmann	0.08	

Date	Sample No.	Location	Lab.No.	Tested By	%hg	Lbs./Ton
10/12/31	510	Greenback tunnel, feeder back from face	.....	A.J.Hofmann	0.07	
"	511	" " Pink streak	.....	do	0.07	
"	512	" " mud slip in face	.....	do	0.06	
"	513	" " hard rock	.....	do	0.05	
"	514	" " bottom of crosscut in face	.....	do	0.06	
"	515	" " new vein cut 10/10/31	.....	do	0.06	
"	123	Ruby Gulch on surface	.....	do	0.08	
"	124	Hole 200' west of tunnel	.....	do	0.04	
11/10/31	128	Princess claim, white streak	.....	A.J.Hofmann	0.04	
"	129	Cosmopolitan cinch hole	.....	do	0.08	
"	130	Gravel under white streak, Princess claim	.....	do	0.10	
"	131	Princess Claim, cinch hole	.....	do	0.05	
"	132	Mud streak under white streak and gravel, Princess claim	.....	do	0.09	
"	133	Prospect badger hole	.....	do	0.02	
5/10/51	...	Mole hole on Goodluck claim	.....	A.J.Hofmann	0.10	2.0
"	...	Cornucopia claim cinch hole	.....	do	0.05	1.0
"	...	Aetna claim cinch hole	.....	do	0.10	2.0
"	...	Ajax claim cinch hole	.....	do	0.70	1.4
"	...	Aztec claim cinch hole	.....	do	0.2	4.0
"	...	Crystal claim, face of portal	.....	do	0.06	1.2
"	...	" " top of hill	.....	do	0.07	1.4
"	...	" " south contact	.....	do	0.09	1.8
"	...	" " north contact	.....	do	0.07	1.4
"	...	Jewel claim cinch hole	.....	do	0.03	0.6
"	...	" " up draw from cinch hole	.....	do	0.06	1.2
"	...	" " 35' southeast of cinch hole	.....	do	0.07	1.4
8/22/31	40-1	Check	31187	E.W.Lazell	0.09	
"	40-2	Check	31188	do	None	
"	40-3	Check	31189	do	None	
"	40-4	Check	31190	do	0.18	
"	41	Check	31191	do	0.36	
9/11/31	...	No description (Assayed 0.02 oz. gold)	313773	E.W.Lazell	0.02	

Date	Sample No.	Location	Lab.No.	Tested By	%Hg	Lbs./Ton
10/7/39	1	Ontka tunnel (the present July Cut #2, BJA)	355	N.W. TestingLab.	0.52	10.4
"	2	Meadow	356	do	0.43	8.6
5/6/40	1	Pit No. 1, grab sample from dump	633	N.W. TestingLab.	...	2.0
"	2	Pit No. 4, grab sample from dump	633	do	...	2.0
"	3	Cut G	633	do	...	1.9
"	4	Cut D, grab sample from dump	633	do	...	Trace
"	5	Pit No. 1, hard rock from dump	633	do	...	Trace
12/31/46	1-a	No data	1987	N.W. TestingLab.	25.50	510.0
"	1-b	Duplicate of 1-a	1987	do	25.30	506.0
"	2	No data	1987	do	None	
12/23/46	1	No data	P-5587	Ore. Dept. of Geol.	0.6	
"	2	No data	P-5588	do	239.2	
7/22/47	...	Morris adit face	P-6310	Ore. Dept. of Geol.	0.6	
11/18/47	1	No data (Morris adit?)	P-6772	do	...	2.0
"	2	No data (0.02 oz. gold per ton)	P-6773	do	...	0.4
9/21/48	1	No data (Morris adit?) Trace gold	P-7827	do	Slight trace	
"	2	No data	P-7828	do	Trace	
10/19/48	...	2nd hole, 84 ft. (July Cut No. 1?)	P-7949	do	Trace	
8/14/50	1	Gouge	P-10238	do	Nil	
"	2	Quartz vein with sulfides	P-10239	do	Trace	
10/16/51	1	1.8' x 0.2' x 0.1' channel across tight shear streak next to hangingwall intermixed with fine stringers of agate and hard gouge. (From pannings and from poorly sized reject from assayer would suggest re-analysis RJW) 660E-600S July Cut #1				
"	2	Same size channel five feet south from above on strike. Much agate and pyrite	35699	Abbot A, Hanks	Trace	
"	3	1.2' x 0.2' x 0.1' five feet south of No. 2	35700	do	Trace	
"	4	1.0' x 0.2' x 0.1' five feet from #3, hard gouge	35702	do	Nil	
"	5	Random chip sample from n.w. wall July				

Date	Sample No.	Location	Lab. No.	Tester	Notes	Assay
10/16/51	6	Random sample from soft yellowish-red gouge about 40' south of #4 near hanging wall on s.e. wall of July Cut #1 below small shaft				
"	7	Random sample from n.w. wall of July Cut #1 from Sample #5 south for about 20 ft.	35704	Abbot A. Hanks	Nil	
			35705	do	Nil	
11/1/51	1	Recheck of above using U.S. Bureau of Mines	35699	B.J. Westman	1.5	
	2	distillation-titration method	35700	do	0.5	
	3		35701	do	0.5	
	4		35702	do	Nil	
	5		35703	do	Nil	
	6		35704	do	Trace	
	7		35705	do	Trace	
11/6/51	01-1	5.0' x 0.5' x 0.2' channel east from foot-wall contact in Oct. Cut No. 1. Decomposed rock with gouge with considerable brown lime.				
				B.J. Westman	0.9	
"	01-2	Same size channel east from above sample. Decomposed volcanics with much gouge and ochre				
				"	1.2	
"	01-3	Same size channel east along cut from above. Much decomposed lime and agate; much iron and manganese oxides with some iron sulfide				
				"	1.6	
"	01-4	Similar to above; same size channel. No iron sulfides and not as soft--more granular				
				"	14.3	
"	01-5	Same size channel east of above along cut. Very granular with much lime and agate with ochre				
				"	Trace	
"	01-6	Same size channel as above and east up cut. No hangingwall observed as cut not deep enough.				
				"	Trace	

Date	Sample No.	Location	Lab. No.	Tested By	%Hg	Lbs./Ton
11/6/51	02-1	3.0' x 0.5' x 0.2' channel east from foot-wall contact in Oct. Cut No. 2. Similar to #01-1				
"	02-2	Same size channel as 02-1 continuing up same cut. Decomposed volcanics with much ochre and agate. (This zone panned trace of gold)		B.J. Westman		Nil
				"		Trace

INDEPENDENT QUICK SILVER CO.

Claim	Original Locator	Witnesses	Date Recorded	Book	Page
Ajax	L. D. Johnson	R. W. Horn C. O. Thomas	May 7, 1932	5	230
Aztec	Elisha A. Baker	Geo. J. Dreis Wm. Cavanaugh	May 7, 1932	5	233
Columbia	A. Nichols	M. R. Elliott	Oct. 24, 1930	5	39
Cosmopolitan	R. W. Horn	R. W. Casebeer Edna L. Slocum	Dec. 1, 1931	5	208
Commodore	F. G. Johnson	A. J. Hofmann	Aug. 15, 1931	5	169
Cornucopia	R. B. Lippon	Geo. J. Dreis F. G. Johnson	May 7, 1932	5	233
Etha (Eatna)	A. J. Hofmann	F. G. Johnson Joseph Enginger, Jr.	May 7, 1932	5	232
Eastern Star	Mrs. F. G. Johnson	Gale Blackwell Cecil Bowlin	Dec. 1, 1931	5	209
Greenback	G. J. Dreis	F. H. DeFo	Oct. 14, 1930	5	31
Jewel	Elisha A. Baker	Geo. J. Dreis Wm. Cavanaugh	May 7, 1932	5	233
Lost Mine (Lost Claim)	Arthur C. Smith	E. J. Perkins	Oct. 14, 1930	5	32
Princess	Margaret A. Hofmann	G. J. Dreis R. B. Lippon	Dec. 1, 1931	5	210

of
INDEPENDENT QUICK SILVER CO.

Claim	Deeded by	Date Deeded to Independent Quick Silver Co.	Book	Page
Ajax	L. D. Johnson	Oct. 13, 1932	48	192
Aztec	E. A. Baker	June 27, 1932	48	162
Columbia	Ella Nichols A. L. Nichols	Nov. 3, 1930	47	491
Cosmopolitan	Doris A. Horn R. W. Horn	July 2, 1932	48	565
Commodore	F. G. Johnson F. W. Johnson	July 2, 1932	48	164
201 Cornucopia	R. B. Lippon	Unable to locate deed to Independent Quick Silver Co.		
Etha (Eatna)	Margaret Hoffman	July 2, 1932	48	167
Eastern Star	F. G. Johnson Mrs. F. G. Johnson	July 2, 1932	48	167
Greenback	Della Mae Dreis G. J. Dreis	Oct. 14, 1930	47	469
Jewel	E. A. Baker	June 27, 1932	48	162
Lost Claim	Arthur C. Smith Stella A. Smith	Dec. 3, 1930	47	506
Princess	A. J. Hoffman Margaret A. Hoffman	July 21, 1932	48	166

Claim	Original Locator (Rediscovered)	Witnesses	Date Recorded	Book	Page
Bohahza (Bononza)	William Thomas Conlin	G. Richards A. Nichols	July 26, 1929	4	510
Crystal	E. J. Perkins - by William Thomas Conlin	A. Conlin G. Richards	July 26, 1929	4	516
Grub Stake	W. J. Bishop - by William Thomas Conlin	R. Richards A. Nichols	July 26, 1929	4	508
Good Luck	Frank S. Johnson - by William Thomas Conlin	R. Richards A. Nichols	July 26, 1929	4	506
Happy Chance	Christian H. Paulsen - by William Thomas Conlin	R. Richards A. Nichols	July 26, 1929	4	517
Hen Era (New Era)	Mildred Russell - by William Thomas Conlin	G. Richards A. Nichols	July 26, 1929	4	504
Pioneer	Frank T. Collier - by William Thomas Conlin	G. Richards A. Nichols	July 26, 1929	4	513
Prospect	F. W. Peck - by William Thomas Conlin	A. Nichols G. Richards	July 26, 1929	4	514
Ruby	August Pautz - by William Thomas Conlin	G. Richards A. Nichols	July 26, 1929	4	511
Zero	A. E. Simmons - by William Thomas Conlin	G. Richards A. Nichols	July 26, 1929	4	507

The ten above mentioned claims were deeded to the Independent Quick Silver Company on the Seventh day of February 1930 and filed Eleventh day of February 1930 in book 47, page 321. These claims were also known as "The Portland Group" and "Consolidated Mining Co."

A power of attorney by said locators of above 10 mentioned claims was given to William Thomas Conlin and filed July 26, 1929 in book 47, page 200.

MINING CLAIMANT'S EXHIBIT V

BURTON J. WESTMAN, B.Sc.
Mining Geologist and Engineer

Member: American Institute of Mining and Metallurgical Engineers...
Western Mining Council

Beaverton, Oregon
October 11, 1951

Independent Quicksilver Co.
638 Park Building
Portland, Oregon

Attention: Mr. George J. Dreis

Subject: Investigation and Sampling in Section 20, T14S, R20E

Gentlemen:

For your records I should like to outline the results of the day spent on October 9, 1951 looking over the area southeast of your main camp more particularly in the new cut just west of the Morris adit as shown on the accompanying Figures 1 and 2.

In that diamond drilling was contemplated, the primary purpose of the visit to the property was to determine the best method of drilling in that I had previously questioned the advisability of diamond drilling such broken and decomposed ore material as had been encountered in the recent excavation. On the property, this contention was borne out in that the sheared ore zones could only be diamond cored with greatest difficulty then with high core loss plus high diamond loss per foot. A much more efficient far less costly method would be in wash boring. For shallow work a chopping bit on a wash pipe boring through 3-inch water pipe used as casing would be most effective; for deeper boring in the more consolidated rock below 20 ft., reverse circulation wash boring using a carbide-set hollow bit on AX casing used as the wash pipe boring through 2-1/2" water pipe casing. The former chops up the formation and washes out the sludge and fragments up to 1" in size; the latter method washes larger cuttings up through the wash pipe and frequently short sections of solid core. Both of these methods are very rapid in broken formation and more so in decomposed surface material. They

accomplish more than a churn drill in sticky formation besides having the advantage of boring at angles up to 50 degrees from the vertical.

The second purpose of the trip to the property was to check the area covered by the U. S. Geological Survey in 1947 as reported by C. D. Bath and K. L. Cook in their "Preliminary Report on a Geophysical Survey of a part of the Johnson Creek Area, Ochoco Quicksilver District, Oregon", 1949. While the report covered for the most part the results of a preliminary magnetic survey, the more interesting portion was the results of a natural-potential electrical survey conducted along Traverses 4E and 4E. This showed that there are definite indications of mineralization in the area just west of the Morris adit. The open cut made since then showed that this area is mineralized quite heavily in places with pyrite or marcasite which account for these electrical anomalies. A check, therefore, was made with a Fisher M-Scope mineral locator which, while limited in depth penetration of some 30 feet, has been found quite uncanny in locating shallow sulfide masses and this held true in and about the recent open cutting where very high anomalies were found extending to the southwest and west. Time did not permit extensive coverage of the area but it would be advisable before further open cutting is conducted.

Regarding the previous reports and investigations including the last one by the U. S. Geological Survey, I was surprised to learn that little or no significance was attached to the extensive springs which occur in the area just west of the recent open cut work and trending up hill to the south. These springs indicate an immense fault or shear zone which, as far as I have been able to determine, has not been explored. Oddly enough, this zone of springs almost coincides with the inferred fault shown on the magnetic map Fig. 3 which accompanied the 1949 USGS report. Much subsurface structure can be obtained from such topographical features as draws, gullies, ridges, etc. which generally are the result of subsurface geology controlling the differential erosion which results in the present topography. This zone of springs, therefore, reflects a zone of weakness and in that cinnabar does occur in the surface material along the marshy slopes below these springs, I would assume that the cinnabar derived from this zone of weakness and should be prospected accordingly.

That considerable faulting has occurred in the area round the new cut was very evident on examining the material exposed in the Cut. All of the rock is more or less shattered and, as shown on Fig. 2, a prominent shear zone was uncovered on the east side of the cut. This shear zone has a strike of North 10° East and dips 75° East. This shear zone appears to widen out toward the south where it enters a very soft zone just below the little shaft. In that the bulldozer would mire down here, no further excavating was done to the south where this shear zone approaches the cross shearing indicated by the springs.

A careful study was made of the mineralization exposed in the cut and it appeared that exposed mineralization faded toward the north and become more intense toward the south. Both the shear zone and the wall rock showed this. In places the wall rock is completely replaced by iron sulfides and appears as a granular blue to green mass which oxidized in the upper four to five feet of bedrock to a red, brown and yellow mass of decomposed rock. Considerable panning all over the cut particularly toward the southern end showed much iron sulfides, some magnetite plus fine granular black mineral. In some of the panning traces of cinnabar was noted. With such an intense mineralization and the soft gooey character of the material panned, I suspected that much of the cinnabar was so fine as to be washed away and that the black and dark red minerals left in the concentrate was metacinnabarite and dark cinnabar. These concentrates were saved and examined later then given qualitative chemical tests. Every one showed mercury particularly the soft ore material just below the little shaft. In that I had no Diphenol Carboside to make a particularly sensitive microchemical test, I used instead solution with nitric acid and copper wire on which any dissolved mercury plates.

Samples were taken as shown on Fig. 2 and are listed as follows:

Sample No. 1 from 1.8' x 0.2' x 0.1' channel cut across the shear zone at approximately (referring to the USGS grid) 660E-600S. Much finely broken banded opalite intermined with gouge.

Sample No. 2 taken 5 feet South 10° West on strike of some shear zone from channel 1.3' x 0.2' x 0.1' across shear. Highly sheared vein material with finely broken banded opalite and pyrite.

Sample No. 3 taken 5 feet from No. 2 on strike from channel 1.2' x 0.2' x 0.1' across shear zone. Similar but more compact than ore material sampled by No. 2.

Sample No. 4 taken 5 feet from No. 3 on strike from channel 1.0' x 0.2' x 0.1' across shear zone. Material highly sheared but more compact than No. 3 with little or no opalite observed but fine pyrite impregnation.

Sample No. 5 taken at random around a 1.0' x 5.0' exposed face of blue rock heavily impregnated with finely divided sulfides on west wall of cut across from portal of adit.

Sample No. 6 taken at random from approximately 2 ft. of soft, red and yellow gouge in shear zone about 40 ft. on strike from No. 4. This material panned by bright reddish orange.

Sample No. 7 was taken at random from west wall of cut south from No. 5 for about 20 feet. Much of this was broken, decomposed wall rock with some sulfide impregnation.

The above samples were shipped to Abbot A. Hanks, Inc., San Francisco, Calif., for mercury analysis. On receipt of returns, I have suggested that the returned discards from Samples No. 5 and 6 be sent to Dr. John Herman of Smith-Emory Co., Los Angeles, for mass spectrographic analysis to determine approximate content of various metals other than mercury.

In conclusion, I must first state that I was very impressed by the mineralized showing exposed in the cut for surely this area is a ore zone of considerable magnitude. Unlike the previous method of exploration, I would strongly suggest that exploration be confined to this mineralized zone and follow it to the southwest by bulldozer cuts at intervals not exceed 50 feet apart. Then on the results of on-the-job testing and panning plus results of assays, I would recommend wash boring to sample depth of this ore zone.

The length of cross cutting with a bulldozer should not exceed 200 feet south and west of the present cut. This would amount to possible one week making five to six cuts east-west across the strike of the shear zone except for the intersection of the shear zone 150 to 200 feet to the south where cuts might possibly be made more northwesterly for better results. The total cost will not exceed \$1,500 and in comparison with the cost of previous underground exploration will result in more ore showings than has been encountered heretofore.

The main objective is to stay with this mineralization following it out on strike in that more will be gained by this method than any theoretical cross-country probing such as has been done before. Following shear zones that will contain the ore will thoroughly prospect the region. Attempting to cut across country to intersect shear zones has been expensive without compensating results. I cannot impress upon you too strongly that only following shears and cross shears will pay the greatest dividends by opening up the ore shoots at intersections of these shear zones.

Respectfully submitted,

(Sgd)

Burton J. Westman

Burton J. Westman, B.Sc.
MINING GEOLOGIST & ENGINEER

BJW/me

MINING CLAIMANT'S EXHIBIT W

REPORT ON THE
INDEPENDENT QUICKSILVER PROPERTY

Sec. 20, T14S - R20E W. M.

Crook County, Oregon

by
Burton J. Westman
Mining Geologist
Aloha, Oregon

November 25, 1952

REPORT ON THE INDEPENDENT QUICKSILVER PROPERTY

Since the writer's last report on the Independent Quicksilver Property, dated December 15, 1951, the writer has spent most of the past summer on other properties nearby. During this time much field evidence was gathered to substantiate the existence of a regional geologic pattern along Johnson Creek that will have a definite bearing on exploring for commercial ore.

During the past year, at various meetings with members of the Independent Quicksilver Co., it was repeatedly stressed that every exploratory move upon the Independent Quicksilver Property would have to be made primarily with development of the geologic structure picture. In an area so adversely covered with overburden this can be the only approach to commercial ore indirect as it may seem at times.

The first step in this direction was the bulldozing in October, 1951, to verify the existence and particularly the strike of the shear zone exposed in the big cut (called the "July Cut No. 1" in the later reports). Two cuts, October Cut No. 1 and October Cut No. 2 did this quite accurately. From the original pace and compass work (October 9, 1951) the strike was assumed to be $N10^{\circ}E$, but later developments have shown the true strike to be $N18^{\circ}50'E$ based on a transit survey.

The next step was to explore this shear zone to the south and expose an intersecting cross fault (trending $N45^{\circ}W$ indicated by the U.S.G.S. geophysical work, local topography and by study of serial photography) also to

strip to the north to expose the shear zone between October Cuts Nos. 1 and 2. Bulldozing during June, 1952, did the latter and exposed a mineralized shear zone more than 50 feet in width above and to the east of a well defined foot-wall. Bulldozing to the south was almost a complete failure due to unexpected deep and extremely rocky overburden. One deep cross cut was made over the postulated cross fault and, on encountering soft ground beneath the rocky overburden, the bulldozer almost disappeared requiring another bulldozer and over two days to extract it.

The next phase of exploration employed contract churn drilling in October 1952. Five holes were planned. Two holes were completed, and the third was stopped due to a worn out bit. Illness of the driller and severe winter weather suspended this operation.

The first two holes, however, did confirm the existence of a major cross fault offsetting the shear zone and, as a result of washing the disturbed material off of the shear zone near Hole No. 3, the presence of a small vein crossing the main shear zone was discovered. This cross vein was then found to carry varying cinnabar values, whereas the enclosing shear zone apparently is relatively barren. Other such cross veins are indicated on the accompanying map. These veins are particularly significant in that they point to the presence of a hanging wall shear zone.

Some of the foregoing now appears to bear out findings of previous years. Gleaning through accumulated papers brought out several interesting discoveries which apparently assayed up to 35 pound ore below the Greenback tunnel, but unfortunately no record or survey was kept of their exact locations.

The same applies to the drill holes shown on the accompanying map particularly Hole No. 4 which must have struck good ore between the 33- and 38-foot depths. Why these showings were not followed is problematical.

Aside from the exploration on the Greenback claim, which is of current interest, much development work prior to 1940 was done on the Bonanza and the New Era Claims 1100 to 1800 feet west. Here some 18,600 tons averaging 5.2 pounds has been proved. At current prices this is equivalent to 1270 flasks valued at around \$254,000. which is an attractive ore reserve.

From a regional standpoint this ore has been developed on a prominent shear zone, bearing $N60^{\circ}E$ from the Mother Lode Mine. This shear zone apparently step faulted repeatedly by cross faults striking in a northwesterly direction. Intersecting this shear zone are cross veins striking $N10^{\circ}E$ to $N20^{\circ}E$. In adjoining mines it was these intersecting cross veins which accounted for most of the ore mined. Here we see a geologic pattern repeated and at some point on the southern portion of the Pioneer claim the very favorable Greenback shear zone will intersect as undoubtedly others of the same strike will.

Regarding the accompanying map showing workings of the Independent Mine, the line from FW-3 to N-2 shows the true course of the footwall of the Greenback shear zone. This probably is the same footwall to which Frank G. Johnson referred in a letter dated August 8, 1938 calling this new vein the "Lavina". This prospect was the small cut near FW-C from which augering produced 400 to 500 colors per 3-lb. panning sample of grey and red mud (gouge) containing a large quantity of quartz. Recently the writer found loose

material near FW-C exposed by stripping which was mostly oddly cellular quartz and cinnabar. This material undoubtedly derived from the indicated cross vein.

Likewise the ore encountered in Drill Hole No. 4, Sept., 1938, very possibly could have been encountered in the vein exposed in the roadway 70 feet southeast of FW-A. The record of this 1938 drilling refers to distances from the Greenback tunnel; true bearings, however, were plotted while magnetic bearings would shift the locations of the drill holes on the map farther north or over and above cross veins. This vein, incidentally, may continue northwest beyond the footwall in that the hard red andesite at FW-B and northeast does not appear in the footwall on the north end of the July No. 1 cut. This is repeated in reverse somewhere between the south end of this cut and the Ontka cut where hard red andesite forms the footwall. That this contact may extend to the northwest is confirmed by the cut made in October, 1952, the bedrock of which is a soft dark granular mineralized rock. This cut was not extended far enough to expose the contact which may well be ore bearing considering the extremely high anomalies over the area indicated by the circled "H" and the good cinnabar showings encountered in the Ontka cut.

These cross veins appear parallel to the indicated major cross fault between FW-3 and FW-4. This fault was confirmed by the recent drilling. Drill Hole No. 1 encountered soft highly mineralized shear zone, bearing some cinnabar for its full depth of 75 feet. Hole No. 2 down to 42 feet total depth

encountered very hard rock with much quartz, although some cinnabar and occasional free mercury were observed by washing some of the cuttings.

This major cross fault is further established by a cut at E-5 where shattered andesite with quartz was encountered. Just south of E-2 another cut was attempted to cut the cross fault, but deep surface prevented this. As reported previously, this cross fault can be observed further to the southeast on the high plateau on Lookout Mt. To date, however, nothing has been observed to determine the extent or direction this cross fault offsets the Greenback shear zone.

Now, regarding the cross veins previously discussed, it seems reasonable to assume that some 100 feet east of the Greenback shear zone footwall, there exists a hanging wall shear zone which the cross veins intersect. The presence of such a hangingwall shear zone was first recognized by Miles Belden, Mining Engineer, who had the Belden Adit started, but which was never extended beyond 25 feet where a soft granular grey andesite was encountered. Pannings above this adit along the hill side of ochreous surface material, however, indicate the proximity of cinnabar bearing zone nearby to the east (uphill beneath the Morris dump). This was shown on the accompanying map as a "Probable Hangingwall Shear Zone".

The Greenback Shear Zone, from observations and ore production elsewhere, is on the $N20^{\circ}E$ strike. Extending this zone about 900 feet to the northeast, an intersection with the Johnson Creek vein will be had in the vicinity of the southeast corner common to the Pioneer and Ruby claims.

The most production steps to further develop the property should be based on the foregoing outline of the geologic structure.

Due to the very poor results , further churn drilling cannot be considered in that not only must the main Greenback shear zone be cut at right angles , but so placed as to cut the cross veins that have been determined to be the cinnabar bearings . In addition to this , cores must be obtained wherever possible and drive sampling with a churn drill does not meet these requirements .

It is advisable , then , to obtain a small diamond drill which can be spotted anywhere and capable of drilling at any angle to a depth of 250 ft . Such a unit can be used for rapid wash boring if need be . Much of the softer rock in the shear zone can be cut and cored with a carbide bit such as is manufactured by Kennametal Corp .

This diamond drilling can be used to prospect the shear zone at FW-4 , in the area of the Belden adit and further northeast .

Additional exploration should be done along those cross veins from the footwall of the Greenback shear zone southeast to the hangingwall .

In that the overburden is very shallow to the northeast , an augering program should be carried on along the strike of the Greenback shear zone in order to follow out this zone to the Pioneer claims . Later , depending upon results , several bulldozer cuts should be made to expose the veins .

This bulldozing can be done following a cleanup project to open those cuts on the New Era and Bonanza claims so that resampling can be accomplished . In addition to this , Cuts A and C should be deepened so as to reach bed-

rock and cut the Johnson Creek vein which must lie immediately to the southeast of Cut D as shown by the quartz and cinnabar which are present in considerable amounts in the overburden above the bedrock east of Cut D. That the Johnson Creek vein was exposed by Cut D, as shown on old maps, cannot be agreed upon in that only relatively undisturbed andesite was observed in the bottom of this cut while much ochre, quartz and other indications of the proximity of a large vein are present in the east bank slopes.

This vein has a strike of $N60^{\circ}E$ and represents the cut-off structure found in the Mother Lode workings. This ore bearing veins are those that have a strike of $N10^{\circ}E$ to $N20^{\circ}E$ which intersects the above cutoff structure of the Johnson Creek vein. Therefore, on exposing the Johnson Creek vein it is imperative to expose the southeast or hangingwall along the strike in order to expose the productive northerly veins, one of which is quite logically responsible for the ore that was developed in Cut G.

In conclusion it must be stated that the foregoing program can and will produce considerable ore providing that the records are kept accurate and up-to-date. This shall include accurate surveying, sampling, and structural mapping to guide exploration as it progresses.

Respectfully submitted,

(Sgd) Burton J. Westman

BURTON J. WESTMAN
Mining Geologist

Aloha, Oregon

BJW: pw

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

FORD M. CONVERSE,

Plaintiff,

v.

CIVIL NO. 65-581

STEWART L. UDALL, Secretary
of the Interior,

Defendant.

INDEPENDENT QUICK SILVER CO.,
an Oregon corporation,

Plaintiff,

v.

CIVIL NO. 65-590

STEWART L. UDALL, Secretary
of the Interior,

Defendant.

OPINION

KILKENNY, DISTRICT JUDGE:

FACTS IN GENERAL

These cases are considered together, as they present many common questions of law and fact. The chain of events culminating in this review began with two hearings in Portland, United States v. Converse (Contest No. 011195-D) and United States v. Independent Quick Silver Co. (Contest No. 06189-A). The hearings were initiated by the Forest Service, United States Department of Agriculture, pursuant to Section 5 of the Act of July 23, 1955, 69 Stat. 369, as amended, 30 U.S.C. § 613 (Supp. 1965).

The statute, popularly known as the Surface Resources Act, provided in general that rights under any mining claim located after July 23, 1955, the date of the Act's passage, would be subject to the right of the United States to manage and dispose of surface resources other than mineral deposits. It also provided that no mining claim located after that date could be used, prior to the issuance of a patent, for purposes other than prospecting, mining and processing. The purpose of this statute was not to abolish mining claims or to significantly alter mining law, but to limit the use, or misuse, of surface resources (such as timber or peat) by a mining claimant prior to the issuance of a patent, and it applies only to mining claims located after July 23, 1955.

Consequently, if a mining claim was in all respects valid prior to July 23, 1955, it was not subject to the right of the United States to manage and dispose its surface resources. But because a mining claim is not considered valid until (a) the boundaries of the claim are marked and until (b) a discovery of a valuable mineral deposit has been made, it became necessary in many instances to make investigations and hold hearings to determine whether or not both of these prerequisites were met prior to the date of the Act's passage. The Act contained detailed provisions for these proceedings.^{1/} It was pursuant to these provisions that the two hearings here in question took place.

The first hearing, United States v. Converse, transpired June 11, 1962, and involved two mining claims.^{2/} The second hearing, United States v.

^{1/} See 30 U.S.C. § 613 (a) to (e) (Supp. 1965)

^{2/} Paymaster and Edith Lode, embraced within Secs. 1 and 2, T. 12 S., R. 4 E., W.M., Oregon, (Willamette National Forest), Recorded in Book 8, Pages 214 and 215, Official Records of Linn County, Oregon.

Independent Quick Silver Co., took place October 1, 1962, and involved twenty-two mining claims. ^{3/} Both of these hearings were presided over by Graydon E. Holt, hearing examiner for the Bureau of Land Management, who was then stationed at Sacramento, California.

UNITED STATES v. CONVERSE

At the Converse hearing, the mining claimant Converse filed a motion to change the hearing examiner and filed an affidavit in support of that motion, charging the hearing examiner with bias and prejudice. The motion was denied because not timely filed, and the hearing continued. From the evidence adduced at the hearing, Hearing Examiner Holt concluded that the most favorable finding which could be made for the mining claimant was that there was sufficient evidence of mineralization to induce a prudent man to retain the claims until a road had been constructed and until more extensive exploration had been completed, but that there was not sufficient evidence of mineralization, as of July 23, 1955, to induce a prudent man to expend labor and means on either the Paymaster or Edith Lode claims with a reasonable expectation of developing a valuable mine. As a result, these two mining claims were held not to have been validated prior to passage of the Surface Resources Act, and were found to be subject to the limitations and restrictions of that Act.

This determination did not directly affect the mining claims themselves. The mining claimant still had the right to use the claims for mining purposes,

/ Happy Chance, Prospect, Crystal, Pioneer, Ruby, Bonanza, Grub Stake, Zero, Good Luck, New Era, Lost Claim, Green Back, Columbia, Eastern Star, Cosmopolitan, Princess, Commodore, Aetna, Ajax, Aztec, Cornucopia and Jewell Mining Claims, embraced within Sections 17, 19, 20, and 21, T. 14 S., R. 20 E., W.M., Crook County, Oregon

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and for any other purpose incidental to mining. The adverse determination to mining claimant Converse only precluded him from using the surface resources (including the timber of the claims, which the parties stipulated to have a value of \$91,038.61) in a manner not incidental to mining, and made the claims subject to the right of the government to manage the surface resources, until a patent was obtained.

Following administrative regulations, claimant Converse appealed the decision of Hearing Examiner Holt to the Director of the Bureau of Land Management. He contended in substance that: a fair hearing was impossible because the examiner was prejudiced and had prejudged the case; he was entitled to a jury trial, and the administrative hearing was a deprivation of property without due process of law; the government had failed to establish a prima facie case, and he had affirmatively showed that a discovery had been made on each of the claims; the hearing examiner erred in holding that assays of ore samples taken by the mining claimant after July 23, 1955, were inadmissible, while those taken by the contestant after the same date were admissible; and, the government's witnesses did not fairly sample portions of the claims alleged to have been opened prior to 1955.

On October 8, 1963, the Assistant Director, Bureau of Land Management, affirmed the decision of Hearing Examiner Holt. Claimant Converse then appealed to the Secretary of the Interior, reiterating essentially the same arguments that were contained in his appeal to the Director of the Bureau of Land Management, and adding the contentions that the Director erred in holding that

exploration and development," as used in mining laws are not synonymous, and that the Director either ignored or refused to accept the facts found by the hearing examiner. On March 26, 1965, the decision of the Assistant Director was affirmed by Ernest F. Hom, Assistant Solicitor of the Interior, pursuant to authority delegated by the Secretary of the Interior.

UNITED STATES v. INDEPENDENT QUICK SILVER CO.

Five days prior to the Independent Quick Silver Co. hearing, the mining claimant mailed a motion for change of hearing examiner, together with a supporting affidavit, charging bias, to Hearing Examiner Holt at his Sacramento office. The claimant argued that this was the first date that it knew Holt was going to hear the matter, but the claimant had been in correspondence with Holt, regarding the case, for some seven months prior to the hearing. This motion was denied by Hearing Examiner Holt at the outset of the hearing, on the grounds that the motion had not been timely filed as required by 5 U.S.C. § 1006 (a). The hearing then continued, and revolved around the charges that there had been no valuable mineral discovery on any of the twenty-two claims prior to July 23, 1955, and that the boundaries of the claims had not been distinctly marked on the ground. Hearing Examiner Holt held that, with respect to the Bonanza claim, a valuable mineral deposit had been found and that the claimant was entitled to surface rights on that claim. Regarding the other twenty-one claims, he found that the government had established a prima facie case in support of the two charges, which had not been refuted by the claimant. As a result, these twenty-one mining claims were held subject to the restrictions of the Surface

Resources Act. Regarding the charge that the boundaries of the claims had not been distinctly marked on the ground, the hearing examiner found that the evidence indicated that there were only two known corner posts for the twenty-two claims involved.

Both the government and Independent Quick Silver Co. appealed from this determination by the hearing examiner. Independent Quick Silver argued that: the hearing examiner erred in failing to grant its motion for change of hearing examiner; the hearing was a denial of due process and equal protection, and a taking of property without just compensation the government failed to establish a prima facie case in support of the charges listed in the notice of hearing; the hearing examiner should have allowed its motion to exclude all of the assay reports of the government which were taken after 1955; it was proven by a preponderance of the evidence that discoveries existed on each of the claims involved; and, the examiner erred in failing to adopt certain of its requested findings of fact. The United States, in its appeal, argued that the hearing examiner had correctly found twenty-one of the claims subject to the limitations of the Surface Resource Act, but that the hearing examiner erred in failing to restrict the mining claimant's surface rights on a portion of the Bonanza claim after finding that the boundaries of that claim were not distinctly marked on the ground, and in finding that a discovery of a valuable mineral deposit had been made on a portion of the Bonanza claim.

On June 23, 1964, James F. Doyle, Chief of the Office of Appeals and Hearings of the Bureau of Land Management, affirmed the decision of Hearing

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examiner Holt insofar as he held that the twenty-one claims were subject to the restrictions of the Surface Resources Act. The hearing examiner's determination that the Bonanza claim was not subject to the restrictions of the Act was reversed, however, and the government's assertions on appeal were adopted. Independent Quick Silver Co. then appealed this decision to the Secretary of the Interior, as provided for in the administrative regulations. On September 21, 1965, the decision of Doyle was affirmed in all respects by Ernest F. Hom, Assistant Solicitor of the Department of the Interior, pursuant to authority delegated by the Secretary of the Interior.

CONTENTIONS

Converse and Independent Quick Silver Co., as plaintiffs, are before this Court, in separate actions, in an attempt to vacate the decisions of the Secretary of the Interior, through his duly authorized Assistant Solicitor, whereby all the mining claims in question were held subject to the restrictions of the Surface Resources Act. Both parties have moved for summary judgment based on the record in the administrative file. Review of Secretary Udall's decision may be had under the Administrative Procedure Act, 5 U.S.C. § 1009. Jurisdiction of this Court is based upon that section and upon 28 U.S.C. § 1331. Venue is laid under 28 U.S.C. § 1391 (e). In both cases, plaintiffs make the following main contentions:

(1) that plaintiffs were denied due process, for they were compelled to try their cause before a hearing examiner who was biased as a matter of law and as a matter of fact;

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(2) that due process was violated because the Secretary of the Interior lacked authority and jurisdiction, by his failure to follow Section 5 of the Act of July 23, 1955, 30 U.S.C. § 613 (a);

(3) that due process was violated because the Secretary's decision was based on charges different from those laid, for the hearing examiner switched the charges laid to a different charge during the hearing.

Plaintiffs then make several contentions which attack the merits of the two decisions. They are:

(4) that the government had failed in its burden of proof, as it did not establish a prima facie case by substantial evidence;

(5) that error had been committed in finding the claims subject to the restrictions of the Surface Resources Act, as the record shows that a valuable deposit of ore was discovered on the claims prior to July 23, 1955.

The United States, as defendant in both these actions, contends that the decisions of the Department of the Interior holding that the government has the surface management rights until such time that patents are issued for the mining claims must be affirmed, as they are fully supported by substantial evidence in the administrative records.

DISCUSSION

Alleged Bias of Hearing Examiner Holt

Independent Quick Silver Co.

In Independent Quick Silver Co., plaintiff insists that Hearing Examiner Holt was biased both as a matter of fact and as a matter of law. As its basis

or arguing bias as a matter of law, plaintiff argues that the hearing examiner signed the Notice of Hearing, that the Notice of Hearing should be treated as a complaint in this case, and that, therefore, the hearing examiner both laid the charges and sat in judgment on his own charges. Plaintiff contends then, that this combination of the prosecuting and judging functions violates both the Administrative Procedure Act and the due process clause of the United States Constitution.

As its basis for arguing bias as a matter of fact, plaintiff calls attention to his motion for change of hearing examiner and supporting affidavit. At the outset of the hearing in question here, the mining claimant attempted to call the hearing examiner as a witness, in support of the charge that he was prejudiced and had pre-judged the case. When the hearing examiner declined to testify, the mining claimant made an offer of proof "to prove that had Graydon Holt, the Hearing Examiner, testified, that he would have admitted that he had pre-judged the case, and, therefore, was prejudiced." The hearing examiner then stated he would not comment on the offer of proof, and plaintiff argues that by passing over the matter without comment the hearing examiner admitted that the charge was correct.

The affidavit signed by the President of Quick Silver is set forth in the
4/
 footnote.

/ "I have ascertained and therefore aver that Graydon E. Holt, Hearing Examiner, has never decided a mining case in favor of mining claimants with respect to the question of sufficiency of mineral discovery in any case involving Oregon lands. That the members of my Company are not agreed and feel that they can not have a fair and impartial trial of their case before Graydon Holt, Hearing Examiner."

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Plaintiff's motion for a change of hearing examiner was denied by Hearing Examiner Holt, on the ground that the motion was not timely filed as required by 5 U. S. C. § 1006 (a).

Converse

In Converse, plaintiff also argues that Hearing Examiner Holt was biased both as a fact and as a matter of law. As its basis for arguing bias as a matter of law, plaintiff utilizes the same argument made in Quick Silver, i.e. that, by signing the Notice of Hearing, Hearing Examiner Holt in effect signed the complaint, and thus took part in the prosecution of the case he later heard.

The basis for arguing bias as a matter of fact is slightly different in this case. An affidavit was filed at the outset of the hearing, in which Converse stated that Hearing Examiner Holt had heard a previous case in which Converse was a mining claimant, and that the case was decided adverse to himself. The ^{5/} balance of the affidavit is set forth in the footnote.

^{5/} "That based upon the decision in that case and upon the conduct of the Examiner in that case, and upon my own independent investigation, I have concluded that said Hearing Examiner cannot try the above entitled case in an impartial manner, that he has prejudged my case and is unable to grasp any evidence which does not harmonize with his preconceived opinion of the matter. That for me to have a hearing before said examiner is a vain and useless gesture. That I am informed and believe that no mining claimant has ever prevailed in the State of Oregon in a contest of this kind heard by Graydon E. Holt. That I am convinced that if said examiner is permitted to hear my case, that he will ignore the facts, refuse to make findings in accordance with the evidence, and will decide the case against me to please his superiors; that he will exercise no independent judgment of his own but will subordinate the merits to politically dictated policy.

Attorney for plaintiff Converse made a motion for change of hearing examiner under the Administrative Procedure Act, 5 U.S.C. § 1006 (a), and asked to call Hearing Examiner Holt to testify in order to prove the averments in Converse's affidavit. The motion for change of hearing examiner was denied, on the ground that it had not been timely filed, and Hearing Examiner Holt refused to testify. The following colloquy then took place between the hearing examiner and Murray, attorney for plaintiff Converse:

"MR. MURRAY: Do I understand that the Hearing Examiner refuses to testify as a witness in support of the facts averred in the affidavit here?

HEARING EXAMINER HOLT: That's correct.

MR. MURRAY: And does the Hearing Examiner deny the offer of proof that we propose to prove by the testimony of the Hearing Examiner as to the facts averred in the affidavit?

HEARING EXAMINER HOLT: I don't deny the facts. I just deny the motion. You may make an offer of proof, if you care to."

Plaintiff Converse argues that the hearing examiner's statement, "I don't deny the facts," is an admission of the truthfulness of all the allegations set out above in the affidavit, and that it, therefore, establishes bias in fact.

The Applicable Law

In NLRB v. Acme-Evans Co., 130 F. 2d 477, 482 (7th Cir. 1942), the Court stated: "The heat of the contest has, we think, led respondent to attribute bias because of the intensity of its own feelings." Those words seem appropriate here, for when the assertions of bias in these cases are closely scrutinized, it seems quite clear that intense feelings are all plaintiffs have been able to

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muster. The briefs, especially on this point, are pregnant with inference, innuendo, and inapplicable (or non-existent) law, but woefully lacking in anything else. It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair. United States ex rel De Luca v. O'Rourke, 213 F.2d 759, 763 (8th Cir. 1954). Plaintiffs, in my opinion, have fallen far short of meeting this test and, conversely, the record indicates that their hearings were conducted fairly and impartially by Hearing Examiner Holt.

A hearing examiner is not biased, either in law or in fact, simply because he previously ruled against one of the parties. NLRB v. Donnelly Garment Co., et al, 330 U.S. 219 (1947). In the light of this opinion, Converse's allegation that Hearing Examiner Holt had ruled against him in a previous case, is, in itself, of no importance.

The allegations in the affidavits that the examiner had never decided a case of this type in favor of mining claimants, are belied by the record which contains copies of findings prepared by the examiner in which he decided wholly or partially in favor of mining claimants in cases involving Oregon land. But, even if we were to assume that Holt was predisposed in favor of the government in such actions, the fact remains that the bias has to be personal in order for them to prevail.

6/ "It has been held that the bias or prejudice alleged must be 'personal', and that a mere prejudgment of the case is not sufficient." Marquette Cement Mfg. Co. v. FTC, 147 F.2d 589, 592 (7th Cir. 1945).

Anyway, plaintiffs have not even attempted to show personal bias on the part of Hearing Examiner Holt. He was most solicitous of their feelings at the hearing, and overruled most of defendant's objections, while at the same time sustaining plaintiffs on many of the "grey" points. In Converse, as an example, Holt excused one of plaintiff's witnesses after a lengthy direct examination, and stipulated that cross-examination could be taken at a later date, because the witness did not want to continue on the stand and had had heart trouble in the past. Hearsay evidence was often admitted into the evidence for plaintiffs by Holt, over objections by government counsel. In short, he, throughout both hearings, went out of his way to accomodate plaintiffs.

The rule that applies to federal judges does not here apply. One of the leading authorities in administrative law, states:

"Unlike federal district judges, examiners and other officers participating in decisions are not forced to withdraw upon the mere filing of a sufficient affidavit." Davis, Administrative Law Text, p. 223.

Plaintiffs' argument that Holt, by signing the notice of hearing, was combining the functions of a prosecutor and a judge, thus violating both the Administrative Procedure Act and due process, is completely specious. These notices of hearing did nothing more than notify the plaintiffs of the issues to be dealt with at the subsequent proceedings. The fact that Holt signed such documents, and later presided at the hearing, is no more a violation of due process than the pre-trial orders federal judges sign every day. Moreover, plaintiffs' contention is based on the premise that the hearing examiner brought the charge against these claims, but the simple fact is that he did not. The

Forest Service initiated the charges, and this is made clear by the notice of hearing. Thus, Holt merely informed the plaintiff of the charges which were brought by the agency. Even if he had instituted the proceedings, this would not have violated the Administrative Procedure Act:

"The APA says nothing about combination of instituting proceedings with judging. Under the Act, the same individual may 'accuse,' in the sense of deciding that proceedings should be instituted, and may also judge." Davis, Administrative Law Text, p. 242.

Support is found in a law review survey of the law in this area. Note, "Disqualification of Administrative Officials for Bias," 13 Vand. L. Rev. 712, 722, n. 65 (1960).

In Independent Quick Silver, plaintiff argues that by passing over the offer to prove that he was biased without commenting on it, Holt admitted that the charge was correct. Plaintiff has not cited any law which indicates silence can be construed as assent in such a situation. On the other hand, United States v. Morgan, 313 U.S. 409 (1941), supports the opposite view.

In Converse, plaintiff argues that when Holt, in denying the offer of proof that he was biased, stated: "I don't deny the facts. I just deny the motion.", he admitted the truthfulness of the allegations contained in the affidavit. One must be a gymnast in semantics in order to arrive at this conclusion. The statement, when read in context, lends nothing to plaintiff's position.

Both motions for change of hearing examiner were denied on the grounds that they were not timely and sufficient as required by 5 U.S.C. § 1006 (a).

There seems to be a substantial basis in the administrative record for this determination.

Regarding the timeliness of the motion in Converse, even though Hearing Examiner Holt signed the notice of hearing, and even though the plaintiff had been in correspondence with Holt, in his official capacity, for some time prior to the hearing, plaintiff insists that the motion for change of hearing examiner could not have been made prior to the start of the hearing, because he did not even suspect Holt was to hear the case. The record anchors a finding that plaintiff knew for some time that Holt was to hear the case. Furthermore, to permit a mining claimant to delay hearings by waiting until the commencement of a hearing to ask for a change of hearing examiner, where as here it was necessary for the hearing examiner to travel several hundred miles to be present at a hearing, would frustrate the administrative process.

In Independent Quick Silver, the motion for change of hearing examiner and supporting affidavit were not "sufficient," inasmuch as they show no real basis for concluding bias. Moreover, the motion does not seem to have been "timely" presented, at least under the circumstances of this case. The motion was not mailed to Holt, at his Sacramento office, until September 26, 1962, five days before the hearing started. Plaintiff states that this was the first date that it "chanced upon the information that Mr. Holt intended to preside." But plaintiff had written to Holt, in his official capacity, some five months prior to the hearing, asking for a postponement. It is the practice of the hearing examiners' office at the Bureau of Land Management to have the hearing

examiner who signs the notice of hearing preside at the hearing and write the decision. The attorney for Independent Quick Silver was experienced with this type of case and should have been aware of that practice. For that matter, it was he who represented plaintiff Converse at the other hearing in question here, which took place over three months prior to the filing of this motion.

Secretary's Authority and Jurisdiction

Both plaintiffs argue that Secretary Udall has denied them due process and "protection of the law" by failing to follow each jurisdictional requirement of the Surface Resources Act, 30 U.S.C. § 613 (a), the statute which gave him authority to determine title problems with reference to mining claims. In both briefs, plaintiffs set out many instances in which they assert the Secretary did not comply with the statutory requirements. They are listed and discussed below.

1. No head of a Federal Department requested the Department of the Interior to publish notice to mining claimant. The Chief of the Forest Service, in fact, requested the Department of the Interior to publish the notice to the mining claimants.

2. No such request was made which contained a description of the land by sections. This is without foundation, as the requests, in fact, contained such descriptions.

3. The request for publication was not accompanied by the required affidavit of an affiant who had, in fact, examined the lands. The requests, in fact, were accompanied by affidavits of affiants who had examined the lands.

4. No request for publication was accompanied by the required certificate of title or abstract of title. Here the plaintiffs are technically correct, as the defendant could not comply with the literal wording of the statute due to the fact that there were no tract indexes of the lands in question maintained in the records of Linn and Crook Counties. Because of this fact, defendant instead submitted certificates of the nonexistence of the tract indexes. Obviously, compliance was impossible and the point does not go to the merits.

5 and 6. Plaintiffs allege that the Secretary did not publish notice as required, and that there is no proof of the publication. The affidavits of publication submitted by defendant show that the notices were published.

7. A copy of the publication was not served on the mining claimant as mandated by the statute. This was not done because the affidavits of examination did not show that plaintiffs were in possession of the claims, and, as pointed out above, no tract indexes were kept of these lands by the counties in which they were situated. However, a man who was found on the claims when the mining engineers examined them was served with a copy of the notice of publication, and the notices were published by the local newspapers in accordance with the regulations. Anyhow, plaintiffs were completely informed of the notice of publication, as they answered it by filing their verified statements. They are in no position to question the service.

Both plaintiffs also argue that the procedure followed by the Bureau of Land Management in initiating contests must be followed in proceedings under the Surface Resources Act. There is no such requirement. The use of a complaint is averted by the publication requirements of that statute.

THE ALLEGED AMENDMENTS

Both plaintiffs assert that due process was violated because the Secretary's decision was based on charges different than those laid, and that the hearing examiner switched the charges during the hearing. This allegation is also without foundation. The Notices of Hearing stated that the questions to be determined would be whether sufficient minerals had been found within the limits of the claims to constitute a discovery of a valuable mineral deposit, and whether the claims were sufficiently marked. This ground was not changed by the hearing examiner or by either of the two administrative appeals decisions which followed in both cases.

Again, plaintiffs indulge in a play on words. They argue that the notice of hearing said only that the question as to whether mineral discovery had been made within the limits of the claims would be determined. Then they argue that this meant only that their case would be won if they could show a valuable mineral deposit within the boundaries of any of the claims, but that the hearing examiner changed the charges by requiring that a valuable mineral deposit be proven in each and every claim. Suffice to say, the Surface Resources Act requires that a mining claim be located on each and every claim, in order for them to escape the scope of the Act. The argument is frivolous.

Plaintiffs make much of the fact that the hearing examiner admitted samples taken by the government after the effective date of the Surface Resources Act, while at the same time denying plaintiffs' motion to admit some samples taken after that date. The issue is not whether there was a discovery at the

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ate of the hearing, but whether a discovery was made upon the claims in question prior to the passage of the Surface Resources Act. To demonstrate a discovery prior to July 23, 1955, required samples of mineral from portions of the claims exposed prior to that date. Plaintiffs' evidence of mineral deposits exposed at a later date was not material. The government's samples were taken from areas which were exposed on or before the date of the Act.

EFFECT OF THE DECISIONS

The Ninth Circuit Court of Appeals has held that:

"It is the function of neither this Court nor of the District Court, in a proceeding such as this, to weigh the evidence adduced in the administrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed." Hendrickson v. Udall, 350 F.2d 949, 950 (9th Cir. 1965); Adams v. United States, 318 F.2d 861 (9th Cir. 1963).

Upon a review of the entire records of the two proceedings in question here, it is my finding that there is substantial evidence to support the Secretary's decision. A discussion of some of plaintiffs' arguments which attack the merits of these decisions follows.

BURDEN OF PROOF

When the government contests a mining claim, it bears the burden of going forward with sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show, by a preponderance of the evidence, that his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). 8 I.D. 235, 238 (1961).

From an examination of the entire record, I find that the government did sustain its burden of proof. Manifestly, the testimony of the government witnesses was sufficient to create a prima facie case in favor of the government's position. Their examination of the claims and their analysis of the mineral samples taken therefrom failed to disclose a discovery of a valuable mineral deposit on any one or more of the claims.

It is now settled beyond question that the issue of whether there has been a valid discovery of minerals is a question of fact. Furthermore, it is indicated that the decision of the Secretary on that issue is conclusive, in the absence of fraud or imposition. Cameron v. United States, 252 U.S. 450 (1920). Whether the decisions of the Secretary of the Interior in this case are conclusive, I need not decide. Certainly, there is no evidence of fraudulent, capricious or arbitrary action on the part of the Interior Department, unless it could be said that the action of the hearing examiner in failing to step aside could be viewed in that light. Already, I have decided adversely to the plaintiffs on this issue. Again, I repeat that the finding that a discovery of a valuable mineral deposit was not made on any one or more of the claims prior to July 23, 1955, is supported by substantial evidence and must not be disturbed.

To be kept in mind is the fact that most of the higher quality samples of minerals, on which plaintiffs rely, were taken from cuts exposed after the effective date of the Act.

BONANZA CLAIM

One more problem which is worthy of discussion is the finding of the

hearing examiner in Independent Quick Silver that the Bonanza Claim was valid. The record quite conclusively shows that the boundary markings on the ground did not measure up to required standards. This fact was recognized by the examiner, but apparently overlooked when preparing his finding on the validity of the claim. Moreover, he assumed that certain improvements were within the boundaries of the claim, despite the fact that no substantial evidence was placed in the record in any way showing that fact.

As pointed out by the record on administrative appeal, the testimony of a Mr. Hogg, on which the hearing examiner relied, was grounded on hearsay. The witness based his testimony, not on his own knowledge, but on information supplied to him by a Mr. Champion, now deceased. The alleged summarization of Champion's panning estimates were not understood by the witness, nor could he make an explanation thereof. Even if I assume that Champion's panning estimates were business records, and thus admissible in evidence, those estimates, on their face, are not sufficient to establish the claim. In any event, there is no substantial evidence that the samples were produced from the earth within the boundaries of the Bonanza Claim, even if legal boundaries in fact existed. I find myself in full agreement with the summarization by the Secretary in his decision.

7/ "...Although some ore was encountered, the writers of the reports apparently did not consider their findings adequate to support extended mining operations but in each report recommended further exploration. As discussed before, one ore body was defined by Hogg, but there was no evidence other than mention of that by Westman, apparently based on his reading of Hogg's report, otherwise verifying that it constituted a mineral deposit which might have value. The evidence does not show that there was any development work done on the ore body. This seems rather strange 23 years after its supposed

(Continued on page 22)

Although other contentions are made by the respective plaintiffs, I feel they are so intertwined with the subjects here discussed that further analysis is not required. It is sufficient to say that I find no substance in such contentions. Overall, the determination of the Secretary in each case must be affirmed.

Of course, this affirmance in no way affects the validity of the mining claims as such. Plaintiffs retain the right to work their claims for mining purposes, and for all purposes incidental to mining. This affirmance only precludes the plaintiffs from using the surface resources of the claims in a manner which is not incidental to mining, until a patent is obtained. In other words, the claims remain subject to the right of the government to manage the surface resources, when not interfering with the mining.

7/ (Continued from page 21)

delineation. The Forest Service mining examiners could not find an ore body exposed which had any cinnabar ore of value.

To conclude, the evidence submitted by the claimant was more quantitative than qualitative. There was a lack of specificity which would relate the information to a particular claim or claims. Much of the evidence was general in nature and much of it, especially specific information, was hearsay where there was no opportunity for cross examination and proper delineation of the purported facts shown. In some instances there was no foundation for some of the information. At the most, even as to the purported ore body on the Bonanza claim, it is apparent that further developmental and exploratory work was recommended. Appellant did not present evidence which would show that any ore bodies supposedly found prior to 1955 constituted valuable mineral deposits as of July 23, 1955, by establishing that a prudent man could expect that the value of the ore would exceed costs in developing the mine and hence could expect that a profitable mine might be developed. This is the test for establishing a discovery in this case..."

The decision of the Secretary in each case must be affirmed.

DATED this 14th day of September, 1966.

John F. Kilkenny
District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

FORD M. CONVERSE,

Plaintiff,

v.

STEWART L. UDALL, Secretary
of the Interior,

Defendant.

INDEPENDENT QUICK SILVER CO.,
an Oregon corporation,

Plaintiff,

v.

STEWART L. UDALL, Secretary
of the Interior,

Defendant.

CIVIL NO. 65-581

CIVIL NO. 65-590

ORDER

This cause is before the Court on plaintiffs' motion for a new trial on the Court's previous decision of September 14, 1966.

Independent Quick Silver again challenges the Government's method of sampling each of the twenty-two claims involved, it being claimed that there was a failure to prove a prima facie case by substantial evidence. It is urged that the six samples of ore taken by the contestant all came from one

of the twenty-two claims in controversy, viz: the Lost Mine Claim.

The evidence is contrary to the plaintiff's contentions. The Forest Service Examiners spent three days examining the claim and, in fact, examined all of the places shown to them by the plaintiff's representatives and took samples of all of the cuts that were open. Plaintiff is not in a position to now urge that all of the samples came from one claim when it was its own representatives who directed the Forest Service Examiners to where to obtain the samples. If, as here, a close scrutiny of the surface indicated that no cuts had been opened other than examined, then it seems rather clear that a mineral discovery had not been made.

Plaintiff again urges that the Assistant Solicitor of the Interior committed error in holding that certain testimony and reports were hearsay. The Solicitor stated, in passing, that much of the evidence was general in nature and that much of it probably, especially specific information, was hearsay where there was no opportunity for cross-examination. Although the Solicitor might have disregarded some of the Hogg statements and the assays compiled by the geologist Westman, the fact remains that the Assistant Solicitor accepted all of this testimony and these records, but found that the evidence lacked specificity and showed only that further exploration was recommended. Plaintiff's real complaint is that the Solicitor did not give more weight to this evidence, rather than excluding it under the hearsay rule.

It is next urged that if the decision of September 14th is allowed to stand that the Court would be approving an administrative decision that the

discovery of a body of ore containing 18,600 tons, with an average of 5.2 pounds of mercury per ton, would not be a discovery within the meaning of the mining law. There is nothing in the decision of the Assistant Solicitor, nor, for that matter, in any part of the record, which supports this argument. The Solicitor merely held that the plaintiff did not sufficiently prove that such a body of ore existed. In other words, the Solicitor resolved the issue of fact against the plaintiff.

I find nothing in the arguments of Quicksilver which would cause me to, in any way, modify my original opinion.

In the Converse case, it is argued that the original decision departs from the well settled rule of discovery and makes discovery depend on the name applied to the additional work which a reasonably prudent person would be justified in expending in both money and effort. It is argued that the Assistant Solicitor has altered the long-standing policy of the Department and now recognizes a distinction between the terms "discovery", "development" and "exploration". The record leaves little doubt that the Department has long recognized a sharp distinction between "exploration" and "development" in connection with whether a "discovery" has been made. For example, if one has found only enough mineral to justify further "exploration", as yet he has not made a "discovery", but if he has found enough mineral to justify a "development", then a "discovery" has been made. The opinion of the Assistant Solicitor is given complete support by United States v. Altman, et al, 68 I.D. 235, 237-8 (1961), from which I quote:

"There is, of course, a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are found of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made."

Additional support is added to the opinion of the Assistant Solicitor by United States v. Edgcomb Exploration Co., Inc., A-29908 (May 25, 1964).

Plaintiff fails to recognize that once the Government has established a prima facie case, the burden shifts to the claimant to show by a preponderance of the evidence that his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

The motion for a new trial in each case is denied.

IT IS SO ORDERED.

DATED this 30th day of November, 1966.

John F. Kilkenny
District Judge

UNITED STATES v. RANDOLPH BELISLE

Colorado 034358-C (February 25, 1966)
 Salt Lake City Office of Hearing Examiner
 Bureau of Land Management

SYLLABUS: MULTIPLE SURFACE USE ACT - Proof of Discovery; DISCOVERY - Nature of Requirement - Prudent Man Test - Proof - Time of Discovery

Where, in a proceeding under Section 5 of the Multiple Surface Use Act, the mining claimant presents evidence sufficient to show that the "prudent man" test has been met, indeed exceeded, adverse proceedings instituted under the Act by the Forest Service will be dismissed. The evidence of the mining claimant included U.S. Geological Survey maps, made in 1942, of old underground workings, which could not be entered at the time of examination by Forest Service personnel, and assay certificates, over 30 years old, of samples taken from the inaccessible workings by the claimant's deceased father, showing commercial values in a six-inch vein marked on the map. (Ed.)

ADVERSE PROCEEDING DISMISSED

This proceeding was brought pursuant to section 5 of Public Law 167 (act of July 23, 1955; 69 Stat. 367). Section 4 of this law provides subject to the right of the United States to manage the vegetative and other surface resources thereof (other than mineral deposits subject to location under the mining laws of the United States) provided that the such surface use by the United States shall not endanger or materially interfere with prospecting, mining, or processing operations or uses reasonably incident thereto on such claims. As to claims located prior to July 23, 1955, P. L. 167 prescribes procedure whereby mining claimants may assert that they have the right to a verified statement filed within 150 days after first publication of a notice to this effect relative to lands including their mining claims.

Mr. Belisle filed a verified statement on June 10, 1960, asserting surface rights as to the Black Jack and Black Dragon lode mining claims, and seven additional lode mining claims, located in San Miguel County, Colorado. By decision dated March 19, 1963, the land office manager, Bureau of Land Management, Denver, Colorado, held that, as a result of examinations made by representatives of the United States Forest Service, proceedings pursuant to section 5 (c) of the act of July 23, 1955, are closed as to all claims except the Black Jack and Black Dragon lode claims. Pursuant to request by the United States Forest Service, a hearing was held on June 25, 1965, at Telluride, Colorado, to determine the validity and effectiveness of the two claims in issue. Mr. Rogers M. Robinson, Office of the General Counsel,

United States Department of Agriculture, Denver, Colorado, appeared for the Forest Service, and Mr. Harrison Loesch, attorney, Montrose, Colorado, appeared for the mining claimant. From the evidence presented at the hearing I hereby make the following:

Findings of Fact and Conclusions of Law

The general area on which the claims are located is comprised of underlying pre-Cambrian schist and gneisses with intrusive granite overlain by a series of sphalsic and metazoic sediment. In the particular area where the claims are located there is a group of undivided sediments, overlain by Oligocene age Telluride conglomerate which in turn is overlain by Miocene age San Juan tuff, consisting of andesites and latites, and above this, a Silverton series of volcanics, all of which have been affected and invaded by later intrusions of granite and gabbroic rock. In brief, the claims in question are located in an area where the rocks are highly altered, silicified, and fractured, with vein fillings, some of which contain metallic minerals of good value. The Telluride area has produced many successful mines in past years.

Mr. Warren C. Roberts, a geologist employed by the Forest Service, examined the claims on August 10 and 11, 1960, accompanied by Mr. Belisle, the mining claimant. One sample was taken from the Black Dragon lode, from the discovery work which consists of a shaft driven into the granite porphyry and intersecting a quartz vein. The sample, weighing 3 1/2 pounds, consisted of quartz vein material containing visible galena, marmatite, pyrite, and silicified granite porphyry, and assayed .04 ounce gold, .9 ounce silver, .9 percent lead, .6 percent zinc, and .05 percent copper. The value of the minerals in this sample was \$2.86 per ton in 1960, but at today's advanced prices the ore has a value of over \$7 per ton.

In 1965, prior to the hearing, Mr. Belisle took a sample from the vein exposed in the discovery pit in the Black Dragon claim at a point 10 feet east of where the 1960 sample was taken. The sample assayed .05 ounce gold, 2.15 ounces silver per ton, 7.35 percent lead, .95 percent zinc, and had a calculated value of \$30.41 per ton.

On August 11, 1960, Mr. Roberts took one sample from the Black Jack lode across a quartz stringer exposed at the center of the face of the discovery cut. The sample fragments consisted of vuggy quartz with iron oxide staining, light to moderate in amount, and assayed values of .02 ounce gold, 0.5 percent lead, and a trace of silver, zinc, and copper, with a computed value, at 1960 prices, of \$0.01 per ton.

Extensive underground workings have been made on the New Dominion

claim which lies adjacent to the Black Jack. One drift extends into and underneath the Black Jack claim. Mr. Roberts was unable to go into this drift because of bad air as the extremities of the workings are oxygen depleted. However, the mining claimant introduced in evidence a United States Department of the Interior Geological Survey map depicting some mines on the north side of Howard Fork Valley, Colorado. The map, prepared by D. J. Varnes and assistants in 1942, shows that one drift in the New Dominion workings exposes a six-inch vein containing by visible inspection more than 50 percent galena and sphalerite. It is this drift which underlies the Black Jack claim. Mr. Roberts admitted that if such a vein exists that amount of mineral would probably assay about \$20 a ton. Mr. Belisle introduced an assay certificate of samples taken by him in 1950 from the Black Jack claim showing a ferric oxide deposit of commercial value. The point of sampling was not shown to Mr. Roberts because Mr. Belisle believed Mr. Roberts would return for re-examination of the two samples taken by him showed low mineral values

Also introduced in evidence were assay certificates dated May 2, 1925, and November 25, 1930, of three samples taken from the workings underlying the Black Jack claim. These samples were taken by the mining claimant's father, now deceased, and the assay reports were of commercial value. The certificates cannot be given as much evidentiary weight as they might had Mr. Belisle's father been present to testify and be subject to cross-examination, but they still must be considered as valid evidence. They are relevant and, based upon testimony given by the mining claimant, reliable.

Based upon his examination, Mr. Roberts was of the opinion that there was an insufficient showing of minerals to warrant a prudent man in the further expenditure of time and money in an effort to develop a paying mine. Mr. Belisle, an experienced miner, expressed an opposite opinion. Mr. Roberts, however, was basing his opinion primarily on the two samples taken by him in 1960. He could not examine the six-inch vein seen and recorded by Mr. Varnes in the Geologic Survey map introduced as mining claimant's exhibit E, nor did he recall having been shown the assay reports of the samples taken by Mr. Belisle's father.

Mr. Roberts testified that ore having a value of \$20 a ton is working proposition. The sample taken from the Black Dragon by Mr. Belisle in 1965 from near the surface contained minerals of considerably higher value than \$20 a ton. The sample taken from the Black Jack claim in 1950 showed values of \$49.90 per ton. Add to this evidence of the mineral exposed in the workings underneath the Black Jack and it is clear that the mining claimant has successfully refuted the prima facie case presented by the Forest Service.

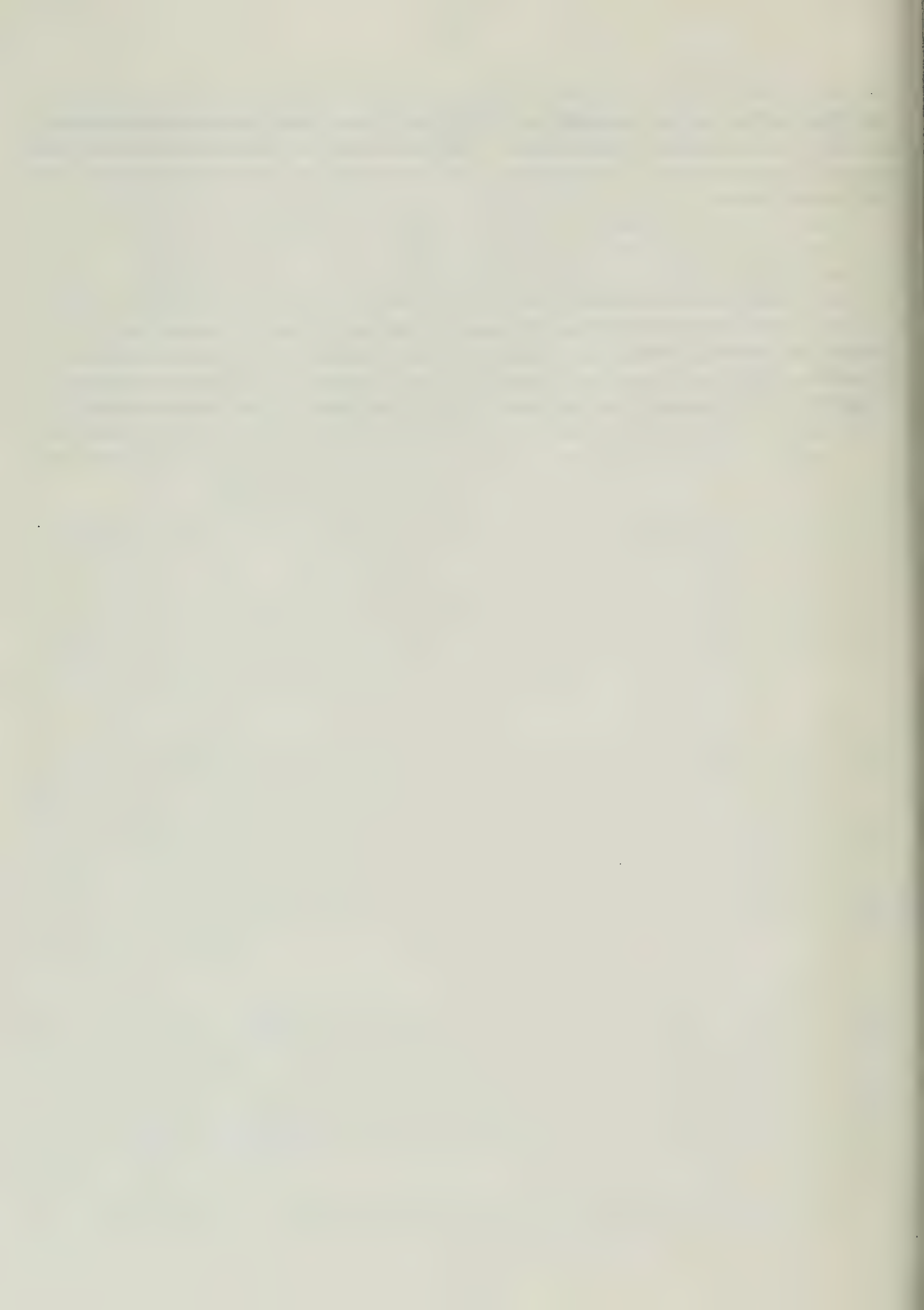
The "prudent man" rule as expressed in Castle v. Womble, 19 L.D. 455 (1895) is that a valid discovery of mineral has been made where the

evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. In the present case, the evidence shows clearly that this test has been met, indeed exceeded, by the mining claimant.

The adverse proceedings are dismissed.

This decision becomes final 30 days from its receipt unless an appeal to the Director, Bureau of Land Management, is filed with the Office of Hearing Examiners, Salt Lake City, Utah. If an appeal is taken, there must be strict compliance with the regulations in 43 CFR Part 1840, copy of which, issued as Circular 2137, is enclosed. Also enclosed is Form 1842-1 which summarizes information on taking appeals to the Director.

(sgd.) John R. Rampton
Hearing Examiner



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDEPENDENT QUICK SILVER COMPANY,
Appellant

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF AND APPENDIX FOR THE SECRETARY OF THE INTERIOR

EDWIN L. WEISL, JR.,
Assistant Attorney General.

SIDNEY I. LEZAK,
United States Attorney,
Portland, Oregon, 87207.

JACK G. COLLINS,
Assistant United States Attorney,
Portland, Oregon, 87207.

FILED ROGER P. MARQUIS,
GEORGE R. HYDE,
JUL 10 1967 Attorneys, Department of Justice,
Washington, D. C., 20530.

WM. B. LUCK, CLERK

JUL 14 1967

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21698

INDEPENDENT QUICK SILVER COMPANY,

Appellant

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE SECRETARY OF THE INTERIOR

OPINION BELOW

The opinion of the district court is not reproduced in the record. For convenience, it is reproduced as an appendix to this brief, infra. The court's order denying plaintiff's motion for a new trial is also reproduced in the appendix to this brief.

JURISDICTION

Jurisdiction of the district court is alleged to be based upon the Administrative Procedure Act, the Declaratory Judgment Act, the existence of a federal question and the inherent power of the court to grant injunctive relief. Appellee does not believe that jurisdiction of the district court over the Secretary of the Interior can be based upon any of the above grounds. Jurisdiction is also stated to be based on the Act of October 5, 1962, 76 Stat. 744, 28 U.S.C. secs. 1361 and 1391, which authorizes actions in the nature of mandamus to compel an officer or employee of the United States to perform a ministerial duty. Appellee agrees that 28 U.S.C. sec. 1361 gives the district court a limited jurisdiction over the Secretary of the Interior and that venue is based on 28 U.S.C. sec. 1391(e). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

Administrative proceedings culminating in a decision of the Secretary of the Interior (R. 17-48) held that the Surface Resources Act of July 23, 1955, providing for federal

management of the surface of unpatented mining claims, applied to the appellant's 22 mining claims. The questions presented are:

1. Whether there are any procedural errors in the administrative proceedings which would require the reversal and institution of new proceedings.
2. Whether the district court erred in finding that appellant's charges of bias on the part of the hearing examiner were groundless.
3. Whether the district court erred in finding that the decision of the Secretary of the Interior was supported by substantial evidence.

STATUTE AND REGULATION INVOLVED

Section 4 of the Act of July 23, 1955, 69 Stat. 367, 368-369, 30 U.S.C. secs. 612(a), 612(b), provides in pertinent part:

- (a) Prospecting, mining or processing operations.

Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.

- (b) Reservations in the United States to use of the surface and surface resources.

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: Provided further, That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: Provided further,

That nothing in sections 601, 603, and 611-615 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

* * * * *

Section 5 of the Act of July 23, 1955, 69 Stat. 367, 369-371, 30 U.S.C. secs. 613(a), 613(c), 613(e), provides in pertinent part:

- (a) Notice to mining claimants; request; publication; service.

The head of a Federal department or agency which has the responsibility for administering surface resources of any lands belonging to the United States may file as to such lands in the office of the Secretary of the Interior, or in such office as the Secretary of the Interior may designate, a request for publication of notice to mining claimants, for determination of surface rights, which request shall contain a description of the lands covered thereby, showing the section or sections of the public land surveys which embrace the lands covered by such request, or if such lands are unsurveyed, either the section or sections which would probably embrace such lands when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument.

The filing of such request for publication shall be accompanied by an affidavit or affidavits of a person or persons over twenty-one years of age setting forth that the affiant or affiants have examined the lands involved in a reasonable effort to ascertain whether any person or persons were in actual possession of or engaged in the working of such lands or any part thereof, and, if no person or persons were found to be in actual possession of or engaged in the working of said lands or any part thereof on the date of such examination, setting forth such fact, or, if any person or persons were so found to be in actual possession or engaged in such working on the date of such examination, setting forth the name and address of each such person, unless affiant shall have been unable through reasonable inquiry to obtain information as to the name and address of any such person, in which event the affidavit shall set forth fully the nature and results of such inquiry.

The filing of such request for publication shall also be accompanied by the certificate of a title or abstract company, or of a title abstractor, or of an attorney, based upon such company's abstractor's, or attorney's examination of those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in said request, setting forth the name of any person disclosed by said instruments to have an interest in said lands under any unpatented mining claim heretofore located, together with the address of such person if such address is disclosed by such instruments of record. "Tract indexes" as used herein shall mean those indexes, if any, as to surveyed lands identifying instruments as affecting a particular legal subdivision of the public

land surveys, and as to unsurveyed lands identifying instruments as affecting a particular probable legal subdivision according to a projected extension of the public land surveys.

Thereupon the Secretary of the Interior, at the expense of the requesting department or agency, shall cause notice to mining claimants to be published in a newspaper having general circulation in the county in which the lands involved are situate.

Such notice shall describe the lands covered by such request, as provided heretofore, and shall notify whomever it may concern that if any person claiming or asserting under, or by virtue of, any unpatented mining claim heretofore located, rights as to such lands or any part thereof, shall fail to file in the office where such request for publication was filed (which office shall be specified in such notice) and within one hundred and fifty days from the date of the first publication of such notice (which date shall be specified in such notice), a verified statement which shall set forth, as to such unpatented mining claim--

- (1) the date of location;
- (2) the book and page of recordation of the notice or certificate of location;
- (3) the section or sections of the public land surveys which embrace such mining claims; or if such lands are unsurveyed, either the section or sections which would probably embrace such mining claim when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument;

(4) whether such claimant is a locator or purchaser under such location; and

(5) the name and address of such claimant and names and addresses so far as known to the claimant of any other person or persons claiming any interest or interests in or under such unpatented mining claim;

such failure shall be conclusively deemed (i) to constitute a waiver and relinquishment by such mining claimant of any right, title, or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and (ii) to constitute a consent by such mining claimant that such mining claim, prior to issuance of patent therefor, shall be subject to the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and (iii) to preclude thereafter, prior to issuance of patent, any assertion by such mining claimant of any right or title to or interest in or under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims.

If such notice is published in a daily paper, it shall be published in the Wednesday issue for nine consecutive weeks, or, if in a weekly paper, in nine consecutive issues, or if in a semiweekly or triweekly paper, in the issue of the same day of each week for nine consecutive weeks.

Within fifteen days after the date of first publication of such notice, the department or agency requesting such publication (1) shall cause a copy of such notice to be personally delivered to or to be mailed by registered mail or by certified mail addressed to each person in possession or engaged in the working of the land whose name and address is shown by an affidavit filed as aforesaid, and to each person who may have filed, as to any lands described in said notice, a request for notices, as provided in subsection (d) of this section, and shall cause a copy of such notice to be mailed by registered mail or by certified mail to each person whose name and address is set forth in the title or abstract company's or title abstractor's or attorney's certificate filed as aforesaid, as having an interest in the lands described in said notice under any unpatented mining claim heretofore located, such notice to be directed to such person's address as set forth in such certificate; and (2) shall file in the office where said request for publication was filed an affidavit showing that copies have been so delivered or mailed.

* * * * *

(c) Hearings.

If any verified statement shall be filed by a mining claimant as provided in subsection (a) of this section, then the Secretary of Interior shall fix a time and place for a hearing to determine the validity and effectiveness of any right or title to, or interest in or under such mining claim, which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in

section 612 of this title as to hereafter located unpatented mining claims, which place of hearing shall be in the county where the lands in question or parts thereof are located, unless the mining claimant agrees otherwise. Where verified statements are filed asserting rights to an aggregate of more than twenty mining claims, any single hearing shall be limited to a maximum of twenty mining claims unless the parties affected shall otherwise stipulate and as many separate hearing 1/ shall be set as shall be necessary to comply with this provision. The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States. If, pursuant to such a hearing the final decision rendered in the matter shall affirm the validity and effectiveness of any mining claimant's so asserted right or interest under the mining claim, then no subsequent proceedings under this section shall have any force or effect upon the so-affirmed right or interest of such mining claimant under such mining claim. If at any time prior to a hearing the department or agency requesting publication of notice and any person filing a verified statement pursuant to such notice shall so stipulate, then to the extent so stipulated, but only to such extent, no hearing shall be held with respect to rights asserted under that verified statement, and to the extent defined by the stipulation the rights asserted under that verified statement shall be deemed to be unaffected by that particular published notice.

1/ So in original. Probably should be "hearings".

* * * * *

- (e) Failure to deliver or mail copy of notice.

If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person or as to the rights asserted by that person and the failure of that person to file a verified statement, as provided in such notice, shall in no manner affect, diminish, prejudice or bar any rights of that person.

43 C.F.R. sec. 1852.3-2 provides:

The examiner shall fix a place and date for the hearing and notify all parties and the Bureau at least 30 days in advance of the date set, unless the parties and the Bureau request or consent to an earlier date. The notice shall include (a) the time, place, and nature of the hearing, (b) the legal authority and jurisdiction under which the hearing is to be held, and (c) the matters of fact and law asserted.

STATEMENT

In this action, appellant seeks to overturn an ad-

^{1/}
ministrative decision of the Secretary of the Interior.

1/ We use the term "Secretary" in this brief, although the decision was by a subordinate acting under delegated authority.

The Secretary held in the decision being challenged (R. 17-48) that the appellant's 22 unpatented mining claims were subject to the restrictions and reservations in Section 4 of the Surface Resources Act of July 23, 1955, 69 Stat. 367, 30 U.S.C. sec. 613. The basic issue to be determined in the agency proceedings was whether or not a valuable deposit of minerals had been discovered on any of the appellant's unpatented mining claims prior to July 23, 1955, the effective date of the Surface Resources Act. If the requirements of a discovery under the mining laws had been met prior to that date, then the provision of the Surface Resources Act would not apply. The Act, in general, provides that any mining claim located after July 23, 1955, gives the right only to use the surface for mining purposes and that the location shall be subject to the right of the United States to manage and dispose of its surface resources other than mineral deposits. The purpose of this Act was to confine the use of surface resources by mining claimants to proper purposes prior to the issuance of a patent.

The Surface Resources Act provides a detailed procedure for determining whether the United States is to have the right to manage and dispose of surface resources of unpatented mining claims which were located prior to the

passage of that Act. In accord with the provisions of that Act, a request was made by the Chief of the Forest Service, acting on behalf of the Secretary of Agriculture, that a determination be made as to who had the right to manage the surface resources of the appellant's unpatented mining claims (R. 305). The validity of the appellant's 22 mining claims was not in issue in this proceeding (App. 69). As required by statute, a request was made that public notice be given to mining claimants (R. 305). Publication, as required, was made (R. 320). Notice was also mailed to mining claimants who had in various ways been identified (R. 319). Also filed were the required certificate of examination (R. 307) and a certificate of nonexistence of tract indexes (R. 318). Within the required time appellant filed a verified statement setting forth certain information regarding his mining claims (R. 21). Upon the filing of this verified statement it became the duty of the Secretary, in compliance with 30 U.S.C. sec. 613(c), to fix the time and place for a hearing to determine the validity of the mining claims to which the claimant asserted rights contrary to the limitations and restrictions of 30 U.S.C. sec. 612. The Act provides in part that (30 U.S.C. sec. 613(c)):

* * * The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States. [Emphasis supplied.]

As required under the regulations of the Department 43 C.F.R. sec. 1852.3-2, supra, p. 11, notice was given to the appellant, by the hearing examiner, of the time and place and nature of the hearing, the legal authority and jurisdiction under which the hearing was to be held and the matters of fact and law asserted. Notice of the hearing was issued on February 14, 1962. It stated that the Forest Service would offer evidence at the hearing to prove that (R. 21):

- (a) Sufficient minerals have not been found within the limits of the claims to constitute a discovery of a valuable mineral deposit.
- (b) The boundaries of the claims are not distinctly marked on the ground.

The district judge, in his opinion (App. 39), has carefully outlined the proceedings which this case has gone through up to this present appeal. Rather than rephrasing this material, we adopt his recital of the facts (App. 44-47)

Five days prior to the Independent Quick Silver Co. hearing, the mining claimant mailed a motion for change of hearing examiner, together with a supporting affidavit, charging bias, to Hearing Examiner Holt at his Sacramento office. The claimant argued that this was the first date that it knew Holt was going to hear the matter, but the claimant had been in correspondence with Holt, regarding the case, for some seven months prior to the hearing. This motion was denied by Hearing Examiner Holt at the outset of the hearing, on the grounds that the motion had not been timely filed as required by 5 U.S.C. § 1006 (a). The hearing then continued, and revolved around the charges that there had been no valuable mineral discovery on any of the twenty-two claims prior to July 23, 1955, and that the boundaries of the claims had not been distinctly marked on the ground. Hearing Examiner Holt held that, with respect to the Bonanza claim, a valuable mineral deposit had been found and that the claimant was entitled to surface rights on that claim. Regarding the other twenty-one claims, he found that the government had established a prima facie case in support of the two charges, which had not been refuted by the claimant. As a result, these twenty-one mining claims were held subject to the restrictions of the Surface Resources Act. Regarding the charge that the boundaries of the claims had not been distinctly marked on the ground, the hearing examiner found that the evidence indicated that there were only two known corner posts for the twenty-two claims involved.

Both the government and Independent Quick Silver Co. appealed from this determination by the hearing examiner. Independent Quick Silver argued that: the hearing examiner erred in failing to grant its motion for change of hearing examiner; the hearing was a denial of due process and equal protection, and a taking of property without just compensation; the government failed to establish a prima facie case in support of the charges listed in the notice of hearing; the hearing examiner should have allowed its motion to exclude all of the assay reports of the government which were taken after 1955; it was proven by a preponderance of the evidence that discoveries existed on each of the claims involved; and, the examiner erred in failing to adopt certain of its requested findings of fact. The United States, in its appeal, argued that the hearing examiner had correctly found twenty-one of the claims subject to the limitations of the Surface Resources Act, but that the hearing examiner erred in failing to restrict the mining claimant's surface rights on a portion of the Bonanza claim after finding that the boundaries of that claim were not distinctly marked on the ground, and in finding that a discovery of a valuable mineral deposit had been made on a portion of the Bonanza claim.

On June 23, 1964, James F. Doyle, Chief of the Office of Appeals and Hearings of the Bureau of Land Management, affirmed the decision of Hearing Examiner Holt insofar as he held that the twenty-one claims were subject to the restrictions of the Surface Resources Act. The hearing examiner's determination that the Bonanza claim was not subject to the restrictions of the Act was

reversed, however, and the government's assertions on appeal were adopted. Independent Quick Silver Co. then appealed this decision to the Secretary of the Interior, as provided for in the administrative regulations. On September 21, 1965, the decision of Doyle was affirmed in all respects by Ernest F. Hom, Assistant Solicitor of the Department of the Interior, pursuant to authority delegated by the Secretary of the Interior.

The mining claimant thereafter instituted this action in the district court, seeking to compel the Secretary to vacate the contest proceedings or alternatively to remand this case for a new trial (R. 4). Both parties moved for summary judgment based upon the record in the administrative proceedings (R. 6, 50).

The district judge in his opinion has fully considered the numerous contentions of the appellant which are raised again in this appeal. The charges of bias, procedural defects, lack of due process and refusal to change hearing examiners are discussed and fully answered by the district court in its comprehensive opinion. The district judge concluded that (App. 64):

Upon a review of the entire records of the two proceedings in question here, it is my finding that there is substantial evidence to support the Secretary's decision.

The district judge went on to hold that (App. 69):

Of course, this affirmance in no way affects the validity of the mining claims as such. Plaintiffs retain the right to work their claims for mining purposes, and for all purposes incidental to mining. This affirmance only precludes the plaintiffs from using the surface resources of the claims in a manner which is not incidental to mining, until a patent is obtained. In other words, the claims remain subject to the right of the government to manage the surface resources, when not interfering with the mining.

From the court's order granting the Secretary's motion for summary judgment, dated September 14, 1966 (R. 143), the appellant filed a motion for a new trial (R. 144), which was denied November 30, 1966. From this final order, the appellant filed its appeal dated January 27, 1967 (R. 164).

SUMMARY OF ARGUMENT

I

The proceedings instituted to determine who shall manage the surface resources of the public domain, upon which appellant has unpatented mining claims, fully complied with

the provisions of the Surface Resources Act. No merit or prejudice has been shown to any of appellant's claims that there has been a failure to follow the statutory provisions of the Surface Resources Act.

Appellant is in no position to challenge the service of notice of these proceedings, since it responded to the notice and appeared at the agency proceedings.

II

The charge that the hearing examiner was biased due to his having signed the notice of hearing is, as the district court held, completely specious.

III

The decision of the Secretary is supported by substantial evidence. It is not the function of this Court to weigh the evidence. Upon a review of the entire administrative proceeding, if there is found substantial evidence to support the Secretary's decision, it must be affirmed.

The district court, after a thorough review of the record, has concluded that the decision of the Secretary is based on substantial evidence. That conclusion is not clearly erroneous.

IV

The administrative record amply supports the Secretary's finding that a valid discovery had not been made on the Bonanza claim. There is no support for appellant's argument that there has been discovered a large deposit of ore on that claim.

Appellant was put on notice that each of its 22 mining claims was being challenged and presented its case with this in mind. Appellant was not misled by the charges raised concerning its mining claims.

The testimony of appellee's examination shifted the burden of proof as to the existence of a discovery to the appellant.

Challenges raised to the qualification of appellee's expert witness are without merit.

The record clearly shows that the boundaries of the subject mining claims did not measure up to the required standards which would have made it impossible to have ever ascertained the exact place where the surface management rights existed, had appellant prevailed.

ARGUMENT

I

THE PROCEDURE FOLLOWED IN DETERMINING
WHO IS ENTITLED TO MANAGE THE SURFACE
RESOURCES OF THE APPELLANT'S UNPATENTED
MINING CLAIMS FULLY COMPLIED WITH
THE PROVISIONS OF 30 U.S.C. SEC. 613

The arguments presented by appellant, to the effect that it has been denied due process of law by the alleged failure of the Secretary of the Interior to follow each jurisdictional requirement of the Surface Resources Act, are completely without foundation. The district judge considered the arguments advanced by the appellant in this respect and fully answers them (App. 60-62). In this case, appellant was clearly put on notice of the proceedings. Appellant did appear and present its case but, on the conflicting evidence presented, it did not prevail. No merit has been shown to any of the appellant's claims that the administrative agency failed to follow the statutory provisions to determine who had the right to manage the surface resources of the subject unpatented mining claims. It is also quite clear that, were the administrative determination of the Secretary in this case to be reversed on the basis of appellant's highly technical arguments and a new hearing ordered to be held, no substantial difference would result in a rehearing.

The Chief of the Forest Service, by letter dated April 10, 1958 (R. 305), requested the Department of the Interior to publish notice of proceedings under the Surface Resources Act. The lands involved were described by public land survey and affidavits of examination were filed (R. 307). There could be no certificate of title or abstract of title, due to the fact that no tract indexes are maintained in the county where the mining claims were located, so a certificate of nonexistence of tract indexes in Crook County, Oregon, was filed (R. 318). Since there were no tract indexes as defined in 30 U.S.C. sec. 613(a), a certificate or abstract of title obviously could not be furnished. Certainly, the fact that the County did not maintain tract indexes did not remove the lands in that County from the operation of the Surface Resources Act. The affidavit of publication shows that the notice of the subject proceedings was published, as required (R. 320). The appellant was not served with a copy of the publication because the affidavits of examination did not show that the appellant was in possession of the mining claims. The affidavits, however, list a Mr. Frank Reid (R. 309).

who is mentioned in the transcript as being on the claims when they were examined (Tr. 42). Mr. Reid was served with notice of publication (R. 319) and evidently either he informed the appellant or notice was received by publication, since appellant responded and filed its verified statement. The district judge held (App. 62): "Anyhow, plaintiffs were completely informed of the notice of publication, as they answered it by filing their verified statements. They are in no position to question the service."

It is argued by appellant that the rules of practice of the Department of the Interior were not followed in respect to the institution of this proceeding (Br. 24). Appellant argues that a complaint must still be filed in order to institute a contest. The section of the Surface Resources Act involved, 30 U.S.C. sec. 613(c), provides that procedures with respect to notice of a hearing and its conduct shall follow the then established general procedures and rules of practice of the Department. The obvious reason that a complaint need not be filed is that the publication requirements of the Act, sec. 613(a), take the place of a complaint. The district court held (App. 62) that "The use of a complaint is averted by the publication requirements of that statute."

It is clear from a reading of the Act that proceedings to ascertain who is to manage the surface resources of mining claims are to be instituted in accord with the procedure set forth in that Act. The Act provides, after stating how the proceedings are to be instituted, publication, etc., that "The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States." 30 U.S.C. sec. 613(c).

This provision of the Act relates not to the institution of proceedings, as appellant would have it, but rather to the conduct of proceedings instituted in the manner Congress provided in the earlier sections. Appellant's argument produced the absurd result that, despite all those specified provisions, a formal complaint must also be filed and served. Neither the language of the statute nor good sense can justify such a conclusion.

Appellant also argues that there has been a failure to comply with the requirement that a certificate of title accompany the request for publication. The district court found that there could not be compliance, due to the fact there were no tract indexes of the lands in question. The court stated "Obviously, compliance was impossible and the point does not go to the merits" (App. 61). The reason for requirement of a title certificate was to ascertain the parties claiming interests in the mining claims, so that they could be notified of the pending proceedings. Notice here has been given and received, hence the court's finding that the supposed defect did not go to the merits. The certificate of nonexistence of tract indexes (R. 318) is also said to be contradicted by the affidavit of service (R. 319). This affidavit is not at all inconsistent with the certificate of nonexistence of tract indexes. The affidavit of service states that notice was mailed to persons in three different categories. Appellant falls in category No. 1. In this instance, apparently no persons would be covered by category No. 3. Obviously, the paragraph (which has no application here), which is said to be inconsistent, is but a part of a form letter.

The only possible objection to paragraph No. 3 would be that it was not stricken from the form letter. This is but a nit pick of no consequence. It should, in addition, be noted that appellant has not challenged the truth of the Government's certificate of nonexistence of tract indexes or that, in fact, it had actual notice of these proceedings.

II

THERE IS NOTHING IN THE RECORD WHICH SUPPORTS THE APPELLANT'S CHARGE THAT THE HEARING EXAMINER WAS BIASED

Appellant argues that, because the hearing examiner signed the notice of hearing, he is both prosecutor and judge and thereby violates the principle that one who is engaged in a prosecuting function shall not judge (Br. 41). The Surface Resources Act provides in pertinent part (30 U.S.C. sec. 613(c))

* * * notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States.

The Department's regulations dealing with this subject are contained in 43 C.F.R. part 1850. Particular attention is directed to sec. 1852.3-2, supra. It is expressly provided by

this section that the examiner will give a notice which shall contain, among other things, "the matters of fact and law asserted." This, the examiner has done, and, for this act of informing the appellant of what the issues to be heard at a hearing are, he is charged as being engaged in a prosecutor function. This charge is patently ridiculous. It produces an absurdity. Appellant would require (again a pure formality) having some other government employee give notice of the hearing examiner's schedule of cases.

The district court, in considering this argument, had this to say (App. 56-57):

Plaintiffs' argument that Holt, by signing the notice of hearing, was combining the functions of a prosecutor and a judge, thus violating both the Administrative Procedure Act and due process, is completely specious. These notices of hearing did nothing more than notify the plaintiffs of the issues to be dealt with at the subsequent proceedings. The fact that Holt signed such documents, and later presided at the hearing, is no more a violation of due process than the pre-trial orders federal judges sign every day. Moreover, plaintiffs' contention is based on the premise that the hearing examiner brought the charge against these claims, but the simple fact is that he did not. The Forest Service initiated the charges, and this is made clear by the notice of hearing. Thus, Holt merely informed the

plaintiff of the charges which were brought by the agency. Even if he had instituted the proceedings, this would not have violated the Administrative Procedure Act:
* * *.

III

THE SECRETARY'S DECISION IS BASED UPON SUBSTANTIAL EVIDENCE

This Court, in Henrikson v. Udall, 350 F.2d 949, 950 (1965) held:

It is the function of neither this Court nor of the District Court, in a proceeding such as this, to weigh the evidence adduced in the administrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed.

See also Foster v. Seaton, 271 F.2d 836, 838-839 (C.A. D.C. 1959).

The district court in this case stated (App. 64):

Upon a review of the entire records of the two proceedings in question here, it is my finding that there is substantial evidence to support the Secretary's decision.

The court went on to hold (App. 65-66):

When the government contests a mining claim, it bears the burden of going forward with sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show, by a preponderance of the evidence, that his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). 69 I.D. 235, 238 (1961).

From an examination of the entire record, I find that the government did sustain its burden of proof. Manifestly, the testimony of the government witnesses was sufficient to create a prima facie case in favor of the government's position. Their examination of the claims and their analysis of the mineral samples taken therefrom failed to disclose a discovery of a valuable mineral deposit on any one or more of the claims.

It is now settled beyond question that the issue of whether there has been a valid discovery of minerals is a question of fact. Furthermore, it is indicated that the decision of the Secretary on that issue is conclusive, in the absence of fraud or imposition. Cameron v. United States, 252 U.S. 450 (1920). Whether the decisions of the Secretary of the Interior in this case are conclusive, I need not decide. Certainly, there is no evidence of fraudulent, capricious or arbitrary action on the part of the Interior Department, unless it could be said that the action of the hearing examiner in failing to step aside could be viewed in that light. Already, I have decided adversely to the plaintiffs on this issue. Again, I repeat that the finding that a discovery of a valuable mineral deposit was not made on any one or more of the claims prior to July 23, 1955, is supported by substantial evidence and must not be disturbed.

To be kept in mind is the fact that most of the higher quality samples of minerals, on which plaintiffs rely, were taken from cuts exposed after the effective date of the Act.

Whether a valid discovery has been made is a question of fact, the decision of which by the Secretary of the Interior, based on substantial evidence, is conclusive, in the absence of fraud or imposition, and none is claimed in this case. Cameron v. United States, 252 U.S. 450, 459-461 (1920); Boesche v. Udall, 373 U.S. 472, 476-477 (1963); Best v. Humboldt Mining Co., 371 U.S. 334, 335-336 (1963). Even though a court in a trial de novo might have arrived at a different result, it may not substitute its judgment for that of the administrative agency expert in its field.

The decision of the Secretary of the Interior explains in considerable detail why the examiner found that no discovery had been made as of July 23, 1955, on appellant's mining claims. In order to reduce the size of this brief, we have not duplicated the Secretary's comprehensive review of the facts and evidence that is the basis of his decision. This material is contained in the Secretary's decision (R. 17-48)

and treats in detail the conflicts in the testimony. The district judge stated (App. 67): "I find myself in full agreement with the summarization by the Secretary in his decision." We submit that the evidence upon which the Secretary's decision was based, as shown by his decision, is substantial and fully supports his decision.

IV

THE RECORD AMPLY SUPPORTS THE SECRETARY'S FINDING THAT A VALID DISCOVERY HAD NOT BEEN MADE ON THE BONANZA CLAIM

Appellant, in its brief (pp. 32-36), assumes that the evidence which it presented as to the existence of a substantial body of ore is conclusive as to whether a valid discovery has been made. The district court, at page 19 of its opinion (App. 67), covers the question of whether a valid discovery has been made. Also included on page 21 of the court's opinion as footnote No. 7 is the summarization of the Secretary on this question (App. 68), with which the district judge found himself in full agreement. Again, the district court considered the question of whether a valid discovery had been made on the Bonanza claim in its order dated November 30, 1966, which is reproduced as part of the appendix to this brief. At page 2 of this order (App. 72), the court states:

It is next urged that if the decision of September 14th is allowed to stand that the Court would be approving an administrative decision that the discovery of a body of ore containing 18,600 tons, with an average of 5.2 pounds of mercury per ton, would not be a discovery within the meaning of the mining law. There is nothing in the decision of the Assistant Solicitor, nor, for that matter, in any part of the record, which supports this argument. The Solicitor merely held that the plaintiff did not sufficiently prove that such a body of ore existed. In other words, the Solicitor resolved the issue of fact against the plaintiff.

I find nothing in the arguments of Quicksilver which would cause me to, in any way, modify my original opinion.

The conclusion of the Secretary, with which the district court found itself in full agreement (App. 68), states that: "The evidence does not show that there was any development work done on the ore body. This seems rather strange 23 years after its supposed delineation. The Forest Service mining examiners could not find an ore body exposed which had any cinnabar ore of value."

Appellant here has simply refused to accept a factual finding adverse to it. Obviously, there is substantial evidence to support the conclusion of the Secretary and the district court that a valid discovery had not been made within the limits of any of the subject mining claims.

Appellant argues that the contestant did not plead or prove a prima facie case as to each of the contested claims (Br. 36). In view of the existence of only two corner posts (infra, p. 37), acceptance of the argument would have made contest impossible. It is also argued that it was not put on notice as to the challenge of each of the 22 claims. The published notice clearly covered any mining claim or claims within the area described in the notice (R. 320). This is obviously notice and, as the district court held (App. 63):

Suffice to say, the Surface Resources Act requires that a mining claim be located on each and every claim, in order for them to escape the scope of the Act. The argument is frivolous.

The Secretary had also considered this argument and concluded that the notice reasonably apprised the appellant of the issues (R. 29) and that, if there were any uncertainty, this could have been resolved by a pre-hearing conference (R. 30). The Secretary also reviewed the provisions of the mining laws pertaining to the location of mining claims, which expressly state that no location of a mining claim shall be made until the "discovery of the vein or lode within the limits of the claim located." R.S. sec. 2320 (1875); 30 U.S.C. sec. 23 (1964).

The Secretary concludes that "Appellant's attorney is an experienced attorney in mining cases and it is extremely doubtful that one of his acumen misunderstood the charge" (R. 30), and that (R. 31): "Nevertheless, despite these contentions, after reviewing the record made at the hearing it is apparent that appellant's attorney attempted to produce as much evidence as possible to show a discovery on as many of the claims as possible and that the failure to relate some of the reports to a particular claim was because of the inability of the witnesses to lay a proper foundation to show their relevance to a given claim. We must conclude that the record fails to show that the appellant was misled by the first charge."

Appellant argues that, by not offering evidence separately as to each of the 22 mining claims, the burden of proof has not been carried by the administrative agency. The transcript of the hearing shows clearly why evidence was not presented as to each separate claim. The mining engineers of the administrative agency spent three days in examining the subject claims, but the appellant's representatives who accompanied them could not point out any corners on any of

the claims (Tr. 14). Therefore, the appellee's mining engineers did the only thing they could do--they examined all the points that were pointed out by appellant's representatives (Tr. 9, 42). Most of the time that appellee's mineral examiners were on the claim they were accompanied by several representatives of the appellant (Tr. 12, 41, 42). Clearly, the appellee does not have the responsibility of making a discovery for the appellant. If there are no discovery points that can be shown by the mining claimant, then it would appear that the testimony of the appellee's examiners as to the nonexistence of a discovery on a claimed location shifts the burden of proof as to the existence of a discovery to the appellant. Foster v. Seaton, 271 F.2d 836 (C.A. D.C. 1959). What the appellant by this argument has attempted to do is to simply reverse the burden of proof and have the appellee prove the nonexistence of what the appellant first must show actually existed.

Appellant has made several allegations concerning the appellant's expert witnesses' qualifications in an attempt to show the lack of evidence to support the administrative agency finding of no discovery (Br. 38). The district court stated (App. 64):

Upon a review of the entire records of the two proceedings in question here, it is my finding that there is substantial evidence to support the Secretary's decision.

The record shows that the mining claims were examined by a graduate mining engineer with extensive practical experience (Tr. 4, 6), and a graduate geologist who has been employed as a geology and mining engineer by three government agencies (Tr. 39, 40). A detailed answer to all of appellant's suggestions of inadequacies in the examination practices of the appellee's experts is set forth in the appellee's reply brief in the district court to which we refer the Court and have not duplicated in this brief (R. 285, 293-296, 302).

The second charge brought against the subject mining claims was that (R. 21):

- (b) The boundaries of the claims are not distinctly marked on the ground.

Appellant, in its argument (Br. 39-41), has ignored this specific charge and argues about facts and issues which are not really in issue. It is not disputed that the evidence conclusively shows that, at the time of the mineral examination,

the boundaries of the claims were not marked distinctly on the ground. The hearing examiner found that the evidence indicated that there were only two known corner posts for the 22 claims involved (App. 46). All that appellant was able to show were maps showing claim boundaries. The district court held that (App. 66): "The record quite conclusively shows that the boundary markings on the ground did not measure up to required standards."

The need for readily ascertaining the boundaries of mining claims is obvious. Unless the boundaries are evident, no decision could ever be made as to the exact place where the Government has the surface management rights and where it does not. The Secretary found that (R. 33): "In the record of this case there is insufficient evidence to show whether or not the claims here were ever properly marked. There is evidence to show that, at the time the Forest Service examiners visited the claims there were inadequate markings to identify the claims properly." The one mining claim which the hearing examiner found to be valid, which was subsequently on appeal determined to be invalid, also lacked properly

marked boundaries. The boundaries could not be readily delineated and, in fact, its boundaries were required to be shifted and remonumented, so that vein passed through the end lines of the claim rather than the side lines (R. 21-22, 36).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

EDWIN L. WEISL, JR.,
Assistant Attorney General.

SIDNEY I. LEZAK,
United States Attorney,
Portland, Oregon, 97207.

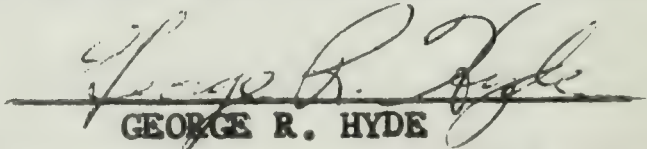
JACK G. COLLINS,
Assistant United States Attorney,
Portland, Oregon, 97207.

ROGER P. MARQUIS,
GEORGE R. HYDE,
Attorneys, Department of Justice,
Washington, D.C., 20530.

JULY 1967

CERTIFICATE OF EXAMINATION OF RULES

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


GEORGE R. HYDE
Attorney, Department of Justice
Washington, D.C., 20530

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

FORD M. CONVERSE,

Plaintiff,

v.

STEWART L. UDALL, Secretary
of the Interior,

Defendant.

CIVIL NO. 65-581

INDEPENDENT QUICK SILVER CO.,
an Oregon corporation,

Plaintiff,

v.

STEWART L. UDALL, Secretary
of the Interior,

Defendant.

CIVIL NO. 65-590

OPINION

KILKENNY, DISTRICT JUDGE:

FACTS IN GENERAL

These cases are considered together, as they present many common questions of law and fact. The chain of events culminating in this review began with two hearings in Portland, United States v. Converse (Contest No. 011195-D) and United States v. Independent Quick Silver Co. (Contest No. 06189-A). The hearings were initiated by the Forest Service, United States Department of Agriculture, pursuant to Section 5 of the Act of July 23, 1955, 69 Stat. 369, as amended, 30 U.S.C. § 613 (Supp. 1965).

The statute, popularly known as the Surface Resource Act, provided in general that rights under any mining claim located after July 23, 1955, the date of the Act's passage, would be subject to the right of the United States to manage and dispose of surface resources other than mineral deposits. It also provided that no mining claim located after that date could be used, prior to the issuance of a patent, for purposes other than prospecting, mining and processing. The purpose of this statute was not to abolish mining claims or to significantly alter mining law, but to limit the use, or misuse, of surface resources (such as timber or peat) by a mining claim- and prior to the issuance of a patent, and it applies only to mining claims located after July 23, 1955.

Consequently, if a mining claim was in all respects valid prior to July 23, 1955, it was not subject to the right of the United States to manage and dispose its surface resources. But because a mining claim is not considered valid until (a) the boundaries of the claim are marked and until (b) a discovery of a valuable mineral deposit has been made, it became necessary in many instances to make investigations and hold hearings to determine whether or not both of these

prerequisites were met prior to the date of the Act's passage.^{1/}
The Act contained detailed provisions for these proceedings.
It was pursuant to these provisions that the two hearings here
in question took place.

The first hearing, United States v. Converse, trans-^{2/}
pired June 11, 1962, and involved two mining claims. The
second hearing, United States v. Independent Quick Silver Co.
took place October 1, 1962, and involved twenty-two mining
claims.^{3/} Both of these hearings were presided over by Graydon E.
Holt, hearing examiner for the Bureau of Land Management, who
was then stationed at Sacramento, California.

^{1/} See 30 U.S.C. § 613 (a) to (e) (Supp. 1965.)

^{2/} Paymaster and Edith Lode, embraced within Secs. 1 and 2,
T. 12 S., R. 4 E., W.M., Oregon, (Willamette National
Forest), Recorded in Book 8, Pages 214 and 215, Official
Records of Linn County, Oregon.

^{3/} Happy Chance, Prospect, Crystal, Pioneer, Ruby, Bonanza,
Grub Stake, Zero, Good Luck, New Era, Lost Claim, Green
Back, Columbia, Eastern Star, Cosmopolitan, Princess,
Commodore, Aetna, Ajax, Aztec, Cornucopia and Jewell Mining
Claims, embraced within Sections 17, 19, 20, and 21, T. 14
S., R. 20 E., W.M., Crook County, Oregon.

UNITED STATES v. CONVERSE

At the Converse hearing, the mining claimant Converse filed a motion to change the hearing examiner and filed an affidavit in support of that motion, charging the hearing examiner with bias and prejudice. The motion was denied because not timely filed, and the hearing continued. From the evidence adduced at the hearing, Hearing Examiner Holt concluded that the most favorable finding which could be made for the Mining claimant was that there was sufficient evidence of mineralization to induce a prudent man to retain the claims until a road had been constructed and until more extensive exploration had been completed, but that there was not sufficient evidence of mineralization, as of July 23, 1955, to induce a prudent man to expend labor and means on either the Paymaster or Edith Lode claims with a reasonable expectation of developing a valuable mine. As a result, these two mining claims were held not to have been validated prior to passage of the Surface Resources Act, and were found to be subject to the limitations and restrictions of that Act.

This determination did not directly affect the mining claims themselves. The mining claimant still had the right to use the claims for mining purposes, and for any other purpose incidental to mining. The adverse determination to mining claimant Converse only precluded him from using the surface resources (including the timber of the claims, which the parties stipulated to have a value of \$91,038.61) in a manner not incidental to mining, and made the claims subject to the right of the government to manage the surface resources, until a patent was obtained.

Following administrative regulations, claimant Converse appealed the decision of Hearing Examiner Holt to the Director of the Bureau of Land Management. He contended in substance that: a fair hearing was impossible because the examiner was prejudiced and had prejudged the case; he was entitled to a jury trial, and the administrative hearing was a deprivation of property without due process of law; the government had failed to establish a prima facie case, and he had affirmatively showed that a discovery had been made on each of the claims; the hearing examiner erred in holding that assays of ore samples taken by the mining claimant after July 23, 1955, were

inadmissible, while those taken by the contestant after the same date were admissible; and, the government's witnesses did not fairly sample portions of the claims alleged to have been opened prior to 1955.

On October 8, 1963, the Assistant Director, Bureau of Land Management, affirmed the decision of Hearing Examiner Holt. Claimant Converse then appealed to the Secretary of the Interior, reiterating essentially the same arguments that were contained in his appeal to the Director of the Bureau of Land Management, and adding the contentions that the Director erred in holding that "exploration and development," as used in mining laws are not synonomous, and that the Director either ignored or refused to accept the facts found by the hearing examiner. On March 26, 1965, the decision of the Assistant Director was affirmed by Ernest F. Hom, Assistant Solicitor of the Interior, pursuant to authority delegated by the Secretary of the Interior.

UNITED STATES v. INDEPENDENT QUICK SILVER CO.

Five days prior to the Independent Quick Silver Co. hearing, the mining claimant mailed a motion for change of hearing examiner, together with a supporting affidavit,

charging bias, to Hearing Examiner Holt at his Sacramento office. The claimant argued that this was the first date that it knew Holt was going to hear the matter, but the claimant had been in correspondence with Holt, regarding the case, for some seven months prior to the hearing. This motion was denied by Hearing Examiner Holt at the outset of the hearing, on the grounds that the motion had not been timely filed as required by 5 U.S.C. § 1006 (a). The hearing then continued, and revolved around the charges that there had been no valuable mineral discovery on any of the twenty-two claims prior to July 23, 1955, and that the boundaries of the claims had not been distinctly marked on the ground. Hearing Examiner Holt held that, with respect to the Bonanza claim, a valuable mineral deposit had been found and that the claimant was entitled to surface rights on that claim. Regarding the other twenty-one claims, he found that the government had established a prima facie case in support of the two charges, which had not been refuted by the claimant. As a result, these twenty-one mining claims were held subject to the restrictions of the Surface Resources Act.

Regarding the charge that the boundaries of the claims had not been distinctly marked on the ground, the hearing examiner found that the evidence indicated that there were only two known corner posts for the twenty-two claims involved.

Both the government and Independent Quick Silver Co. appealed from this determination by the hearing examiner. Independent Quick Silver argued that: the hearing examiner erred in failing to grant its motion for change of hearing examiner; the hearing was a denial of due process and equal protection, and a taking of property without just compensation; the government failed to establish a prima facie case in support of the charges listed in the notice of hearing; the hearing examiner should have allowed its motion to exclude all of the assay reports of the government which were taken after 1955; it was proven by a preponderance of the evidence that discoveries existed on each of the claims involved; and, the examiner erred in failing to adopt certain of its requested findings of fact. The United States, in its appeal, argued that the hearing examiner had correctly found twenty-one of the claims subject to the limitations of the Surface Resources Act, but that the hearing examiner

erred in failing to restrict the mining claimant's surface rights on a portion of the Bonanza claim after finding that the boundaries of that claim were not distinctly marked on the ground, and in finding that a discovery of a valuable mineral deposit had been made on a portion of the Bonanza claim.

On June 23, 1964, James F. Doyle, Chief of the Office of Appeals and Hearings of the Bureau of Land Management, affirmed the decision of Hearing Examiner Holt insofar as he held that the twenty-one claims were subject to the restrictions of the Surface Resources Act. The hearing examiner's determination that the Bonanza claim was not subject to the restrictions of the Act was reversed, however, and the government's assertions on appeal were adopted. Independent Quick Silver Co. then appealed this decision to the Secretary of the Interior, as provided for in the administrative regulations. On September 21, 1965, the decision of Doyle was affirmed in all respects by Ernest F. Hom, Assistant Solicitor of the Department of the Interior, pursuant to authority delegated by the Secretary of the Interior.

CONTENTIONS

Converse and Independent Quick Silver Co., as plaintiffs, are before this Court, in separate actions, in an attempt to vacate the decisions of the Secretary of the Interior, through his duly authorized Assistant Solicitor, whereby all the mining claims in question were held subject to the restrictions of the Surface Resources Act. Both parties have moved for summary judgment based on the record in the administrative file. Review of Secretary Udall's decision may be had under the Administrative Procedure Act, 5 U.S.C. § 1009. Jurisdiction of this Court is based upon that section and upon 28 U.S.C. § 1331. Venue is laid under 28 U.S.C. § 1391 (e). In both cases, plaintiffs make the following main contentions:

(1) that plaintiffs were denied due process, for they were compelled to try their cause before a hearing examiner who was biased as a matter of law and as a matter of fact;

(2) that due process was violated because the Secretary of the Interior lacked authority and jurisdiction, by his failure to follow Section 5 (a) of the Act of July 23, 1955, 30 U.S.C. § 613 (a);

(3) that due process was violated because the Secretary's decision was based on charges different from those laid, for the hearing examiner switched the charges laid to a different charge during the hearing.

Plaintiffs then make several contentions which attack the merits of the two decisions. They are:

(4) that the government had failed in its burden of proof, as it did not establish a prima facie case by substantial evidence;

(5) that error had been committed in finding the claims subject to the restrictions of the Surface Resources Act, as the record shows that a valuable deposit of ore was discovered on the claims prior to July 23, 1955.

The United States, as defendant in both these actions, contends that the decisions of the Department of the Interior holding that the government has the surface management rights until such time that patents are issued for the mining claims must be affirmed, as they are fully supported by substantial evidence in the administrative records.

DISCUSSION

Alleged Bias of Hearing Examiner Holt

Independent Quick Silver Co.

In Independent Quick Silver Co., plaintiff insists that Hearing Examiner Holt was biased both as a matter of fact and as a matter of law. As its basis for arguing bias as a matter of law, plaintiff argues that the hearing examiner signed the Notice of Hearing, that the Notice of Hearing should be treated as a complaint in this case, and that, therefore, the hearing examiner both laid the charges and sat in judgment on his own charges. Plaintiff contends then, that this combination of the prosecuting and judging functions violates both the Administrative Procedure Act and the due process clause of the United States Constitution.

As its basis for arguing bias as a matter of fact, plaintiff calls attention to his motion for change of hearing examiner and supporting affidavit. At the outset of the hearing in question here, the mining claimant attempted to call the hearing examiner as a witness, in support of the charge that he was prejudiced and had pre-judged the case.

When the hearing examiner declined to testify, the mining claimant made an offer of proof "to prove that had Graydon Holt, the Hearing Examiner, testified, that he would have admitted that he had pre-judged the case, and, therefore, was prejudiced." The hearing examiner then stated he would not comment on the offer of proof, and plaintiff argues that by passing over the matter without comment the hearing examiner admitted that the charge was correct.

The affidavit signed by the President of Quick Silver is set forth in the footnote.^{4/}

Plaintiff's motion for a change of hearing examiner was denied by Hearing Examiner Holt, on the ground that the motion was not timely filed as required by 5 U.S.C. § 1006 (a).

Converse

In Converse, plaintiff also argues that Hearing Examiner Holt was biased both as a fact and as a matter of law. As its basis for arguing bias as a matter of law, plaintiff utilizes the same arguments made in Quick Silver, i.e.,

^{4/} "I have ascertained and therefore aver that Graydon E. Holt, Hearing Examiner, has never decided a mining case in favor of mining claimants with respect to the question of sufficiency of mineral discovery in any case involving Oregon lands. That the members of my Company are not agreed and feel that they can not have a fair and impartial trial of their case before Graydon Holt, Hearing Examiner."

that, by signing the Notice of Hearing, Hearing Examiner Holt in effect signed the complaint, and thus took part in the prosecution of the case he later heard.

The basis for arguing bias as a matter of fact is slightly different in this case. An affidavit was filed at the outset of the hearing, in which Converse stated that Hearing Examiner Holt had heard a previous case in which Converse was a mining claimant, and that the case was decided adverse to himself. The balance of the affidavit is set forth in the footnote.^{5/}

^{5/} "That based upon the decision in that case and upon the conduct of the Examiner in that case, and upon my own independent investigation, I have concluded that said Hearing Examiner cannot try the above entitled case in an impartial manner, that he has prejudged my case and is unable to grasp any evidence which does not harmonize with his preconceived opinion of the matter. That for me to have a hearing before said examiner is a vain and useless gesture. That I am informed and believe that no mining claimant has ever prevailed in the State of Oregon in a contest of this kind heard by Graydon E. Holt. That I am convinced that if said examiner is permitted to hear my case, that he will ignore the facts, refuse to make findings in accordance with the evidence, and will decide the case against me to please his superiors; that he will exercise no independent judgment of his own but will subordinate the merits to politically dictated policy."

Attorney for plaintiff Converse made a motion for change of hearing examiner under the Administrative Procedure Act, 5 U.S.C. § 1006 (a), and asked to call Hearing Examiner Holt to testify in order to prove the averments in Converse's affidavit. The motion for change of hearing examiner was denied, on the ground that it had not been timely filed, and Hearing Examiner Holt refused to testify. The following colloquy then took place between the hearing examiner and Murray, attorney for plaintiff Converse:

"MR. MURRAY: Do I understand that the Hearing Examiner refuses to testify as a witness in support of the facts averred in the affidavit here?

HEARING EXAMINER HOLT: That's correct.

MR. MURRAY: And does the Hearing Examiner deny the offer of proof that we propose to prove by the testimony of the Hearing Examiner as to the facts averred in the affidavit?

HEARING EXAMINER HOLT: I don't deny the facts. I just deny the motion. You may make an offer of proof, if you care to."

Plaintiff Converse argues that the hearing examiner's statement, "I don't deny the facts," is an admission of the truthfulness of all the allegations set out above in the affidavit, and that it, therefore, establishes bias in fact.

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The Applicable Law

In NLRB v. Acme-Evans Co., 130 F.2d 477, 482 (7th Cir. 1942), the Court stated: "The heat of the contest has, we think, led respondent to attribute bias because of the intensity of its own feelings." Those words seem appropriate here, for when the assertions of bias in these cases are closely scrutinized, it seems quite clear that intense feelings are all plaintiffs have been able to muster. The briefs, especially on this point, are pregnant with inference, inuendo, and inapplicable (or non-existent) law, but woefully lacking in anything else. It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair. United States ex rel De Luca v. O'Rourke, 213 F.2d 759, 763 (8th Cir. 1954). Plaintiffs, in my opinion, have fallen far short of meeting this test and, conversely, the record indicates that their hearings were conducted fairly and impartially by Hearing Examiner Holt.

A hearing examiner is not biased, either in law or in fact, simply because he previously ruled against one of the parties. NLRB v. Donnelly Garment Co., et al, 330 U.S.

219 (1947). In the light of this opinion, Converse's allegation that Hearing Examiner Holt had ruled against him in a previous case, is, in itself, of no importance.

The allegations in the affidavits that the examiner had never decided a case of this type in favor of mining claimants, are belied by the record which contains copies of findings prepared by the examiner in which he decided wholly or partially in favor of mining claimants in cases involving Oregon land. But, even if we were to assume that Holt was predisposed in favor of the government in such actions, the fact remains that the bias has to be personal in order for them to prevail.^{6/}

Anyway, plaintiffs have not even attempted to show personal bias on the part of Hearing Examiner Holt. He was most solicitous of their feelings at the hearing, and overruled most of defendant's objections, while at the same time sustaining plaintiffs on many of the "grey" points. In Converse,

^{6/} "It has been held that the bias or prejudice alleged must be 'personal,' and that a mere prejudgment of the case is not sufficient." Marquette Cement Mfg. Co. v. FTC, 147 F.2d 589, 592 (7th Cir. 1945).

as an example, Holt excused one of plaintiff's witnesses after lengthy direct examination, and stipulated that cross-examination could be taken at a later date, because the witness did not want to continue on the stand and had had heart trouble in the past. Hearsay evidence was often admitted into the evidence for plaintiffs by Holt, over objections by government counsel. In short, he, throughout both hearings, went out of his way to accomodate [sic] plaintiffs.

The rule that applies to federal judges does not here apply. One of the leading authorities in administrative law, states:

"Unlike federal district judges, examiners and other officers participating in decisions are not forced to withdraw upon the mere filing of a sufficient affidavit."
Davis, Administrative Law Text, p. 223.

Plaintiffs' argument that Holt, by signing the notice of hearing, was combining the functions of a prosecutor and a judge, thus violating both the Administrative Procedure Act and due process, is completely specious. These notices of hearing did nothing more than notify the plaintiffs of the issues to be dealt with at the subsequent proceedings. The fact that Holt signed such documents, and later presided at the hearing,

is no more a violation of due process than the pre-trial orders federal judges sign every day. Moreover, plaintiffs' contention is based on the premise that the hearing examiner brought the charge against these claims, but the simple fact is that he did not. The Forest Service initiated the charges, and this is made clear by the notice of hearing. Thus, Holt merely informed the plaintiff of the charges which were brought by the agency. Even if he had instituted the proceedings, this would not have violated the Administrative Procedure Act:

"The APA says nothing about combination of instituting proceedings with judging. Under the Act, the same individual may 'accuse,' in the sense of deciding that proceedings should be instituted, and may also judge."
Davis, Administrative Law Text, p. 242.

Support is found in a law review survey of the law in this area. Note, "Disqualification of Administrative Officials for Bias," 13 Vand. L. Rev. 712, n. 65 (1960).

In Independent Quick Silver, plaintiff argues that by passing over the offer to prove that he was biased without commenting on it, Holt admitted that the charge was correct. Plaintiff has not cited any law which indicates silence can be construed as assent in such a situation. On the other hand, United States v. Morgan, 313 U.S. 409 (1941), supports the opposite view.

In Converse, plaintiff argues that when Holt, in denying the offer of proof that he was biased, stated: "I don't deny the facts. I just deny the motion.", he admitted the truthfulness of the allegations contained in the affidavit. One must be a gymnast in semantics in order to arrive at this conclusion. The statement, when read in context, lends nothing to plaintiff's position.

Both motions for change of hearing examiner were denied on the grounds that they were not timely and sufficient as required by 5 U.S.C. § 1006 (a). There seems to be a substantial basis in the administrative record for this determination.

Regarding the timeliness of the motion in Converse, even though Hearing Examiner Holt signed the notice of hearing, and even though the plaintiff had been in correspondence with Holt, in his official capacity, for some time prior to the hearing, plaintiff insists that the motion for change of hearing examiner could not have been made prior to the start of the hearing, because he did not even suspect Holt was to hear the case. The record anchors a finding that plaintiff knew for

some time that Holt was to hear the case. Furthermore, to permit a mining claimant to delay hearings by waiting until the commencement of a hearing to ask for a change of hearing examiner, where as here it was necessary for the hearing examiner to travel several hundred miles to be present at a hearing, would frustrate the administrative process.

In Independent Quick Silver, the motion for change of hearing examiner and supporting affidavit were not "sufficient," inasmuch as they show no real basis for concluding bias. Moreover, the motion does not seem to have been "timely" presented, at least under the circumstances of this case. The motion was not mailed to Holt, at his Sacramento office, until September 26, 1962, five days before the hearing started. Plaintiff states that this was the first date that it "chanced upon the information that Mr. Holt intended to preside." But plaintiff had written to Holt, in his official capacity, some five months prior to the hearing, asking for a postponement. It is the practice of the hearing examiners' office at the Bureau of Land Management to have the hearing examiner who signs the notice of hearing preside at the hearing and write the decision. The attorney for Independent Quick Silver was experienced with this type of case and should have been aware

of that practice. For that matter, it was he who represented plaintiff Converse at the other hearing in question here, which took place over three months prior to the filing of this motion..

Secretary's Authority and Jurisdiction

Both plaintiffs argue that Secretary Udall has denied them due process and "protection of the law" by failing to follow each jurisdictional requirement of the Surface Resources Act, 30 U.S.C. § 613 (a), the statute which gave him authority to determine title problems with reference to mining claims. In both briefs, plaintiffs set out many instances in which they assert the Secretary did not comply with the statutory requirements. They are listed and discussed below.

1. No head of a Federal Department requested the Department of the Interior to publish notice to mining claimant. The Chief of the Forest Service, in fact, requested the Department of the Interior to publish the notice to the mining claimants.

2. No such request was made which contained a description of the land by sections. This is without foundation, as the requests, in fact, contained such descriptions.

3. The request for publication was not accompanied by the required affidavit of an affiant who had, in fact, examined the lands. The requests, in fact, were accompanied by affidavits of affiants who had examined the lands.

4. No request for publication was accompanied by the required certificate of title or abstract of title. Here the plaintiffs are technically correct, as the defendant could not comply with the literal wording of the statute due to the fact that there were no tract indexes of the lands in question maintained in the records of Linn and Crook Counties. Because of this fact, defendant instead submitted certificates of the non-existence of the tract indexes. Obviously, compliance was impossible and the point does not go to the merits.

5 and 6. Plaintiffs allege that the Secretary did not publish notice as required, and that there is no proof of the publication. The affidavits of publication submitted by defendant show that the notices were published.

7. A copy of the publication was not served on the mining claimant as demanded by the statute. This was not done because the affidavits of examination did not show that plaintiffs were in possession of the claims, and, as pointed out

above, no tract indexes were kept of these lands by the counties in which they were situated. However, a man who was found on the claims when the mining engineers examined them was served with a copy of the notice of publication, and the notices were published by the local newspapers in accordance with the regulations. Anyhow, plaintiffs were completely informed of the notice of publication, as they answered it by filing their verified statements. They are in no position to question the service.

Both plaintiffs also argue that the procedure followed by the Bureau of Land Management in initiating contests must be followed in proceedings under the Surface Resources Act. There is no such requirement. The use of a complaint is averted by the publication requirements of that statute.

THE ALLEGED AMENDMENTS

Both plaintiffs assert that due process was violated because the Secretary's decision was based on charges different than those laid, and that the hearing examiner switched the charges during the hearing. This allegation is also without foundation. The Notices of Hearing stated that the questions to be determined would be whether sufficient minerals had

been found within the limits of the claims to constitute a discovery of a valuable mineral deposit, and whether the claims were sufficiently marked. This ground was not changed by the hearing examiner or by either of the two administrative appeals decisions which followed in both cases.

Again, plaintiffs indulge in a play on words. They argue that the notice of hearing said only that the question as to whether mineral discovery had been made within the limits of the claims would be determined. Then they argue that this meant only that their case would be won if they could show a valuable mineral deposit within the boundaries of any of the claims, but that the hearing examiner changed the charges by requiring that a valuable mineral deposit be proven in each and every claim. Suffice to say, the Surface Resources Act requires that a mining claim be located on each and every claim, in order for them to escape the scope of the Act. The argument is frivolous.

Plaintiffs make much of the fact that the hearing examiner admitted samples taken by the government after the effective date of the Surface Resources Act, while at the same

time denying plaintiffs' motion to admit some samples taken after that date. The issue is not whether there was a discovery at the date of the hearing, but whether a discovery was made upon the claims in question prior to the passage of the Surface Resources Act. To demonstrate a discovery prior to July 23, 1955, required samples of mineral from portions of the claims exposed prior to that date. Plaintiffs' evidence of mineral deposits exposed at a later date was not material. The government's samples were taken from areas which were exposed on or before the date of the Act.

EFFECT OF THE DECISIONS

The Ninth Circuit Court of Appeals has held that:

"It is the function of neither this Court nor of the District Court, in a proceeding such as this, to weigh the evidence adduced in the administrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed." Hendrickson v. Udall, 350 F.2d 949, 950 (9th Cir. 1965); Adams v. United States, 318 F.2d 861 (9th Cir. 1963).

Upon a review of the entire records of the two proceedings in question here, it is my finding that there is substantial evidence to support the Secretary's decision. A discussion of some of plaintiffs' arguments which attack the merits of these decisions follows.

BURDEN OF PROOF

When the government contests a mining claim, it bears the burden of going forward with sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show, by a preponderance of the evidence, that his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). 68 I.D. 235, 238 (1961).

From an examination of the entire record, I find that the government did sustain its burden of proof. Manifestly, the testimony of the government witnesses was sufficient to create a prima facie case in favor of the government's position. Their examination of the claims and their analysis of the mineral samples taken therefrom failed to disclose a discovery of a valuable mineral deposit on any one or more of the claims.

It is now settled beyond question that the issue of whether there has been a valid discovery of minerals is a question of fact. Furthermore, it is indicated that the decision of the Secretary on that issue is conclusive, in the absence of fraud or imposition. Cameron v. United States, 252 U.S. 450 (1920). Whether the decisions of the Secretary of the Interior in this case are conclusive, I need not decide. Certainly, there is no evidence of fraudulent,

capricious or arbitrary action on the part of the Interior Department, unless it could be said that the action of the hearing examiner in failing to step aside could be viewed in that light. Already, I have decided adversely to the plaintiffs on this issue. Again, I repeat that the finding that a discovery of a valuable mineral deposit was not made on any one or more of the claims prior to July 23, 1955, is supported by substantial evidence and must not be disturbed.

To be kept in mind is the fact that most of the higher quality samples of minerals, on which plaintiffs rely, were taken from cuts exposed after the effective date of the Act.

BONANZA CLAIM

One more problem which is worthy of discussion is the finding of the hearing examiner in Independent Quick Silver that the Bonanza Claim was valid. The record quite conclusively shows that the boundary markings on the ground did not measure up to required standards. This fact was recognized by the examiner, but apparently overlooked when preparing his finding on the validity of the claim. Moreover, he assumed that certain improvements were within the

boundaries of the claim, despite the fact that no substantial evidence was placed in the record in any way showing that fact.

As pointed out by the record on administrative appeal, the testimony of a Mr. Hogg, on which the hearing examiner relied, was grounded on hearsay. The witness based his testimony, not on his own knowledge, but on information supplied to him by a Mr. Champion, now deceased. The alleged summarization of Champion's panning estimates were not understood by the witness, nor could he make an explanation thereof. Even if I assume that Champion's panning estimates were business records, and thus admissible in evidence, those estimates, on their face, are not sufficient to establish the claim. In any event, there is no substantial evidence that the samples were produced from the earth within the boundaries of the Bonanza Claim, even if legal boundaries in fact existed. I find myself in full agreement with the

summarization by the Secretary in his decision. 7/

Although other contentions are made by the respective plaintiffs, I feel they are so intertwined with the subjects here discussed that further analysis is not required. It is sufficient to say that I find no substance in such contentions. Overall, the determination of the Secretary in each case must be affirmed.

7/ ". . . Although some ore was encountered, the writers of the reports apparently did not consider their findings adequate to support extended mining operations but in each report recommended further exploration. As discussed before, one ore body was defined by Hogg, but there was no evidence other than mention of that by Westman, apparently based on his reading of Hogg's report, otherwise verifying that it constituted a mineral deposit which might have value. The evidence does not show that there was any development work done on the ore body. This seems rather strange 23 years after its supposed delineation. The Forest Service mining examiners could not find an ore body exposed which had any cinnabar ore of value.

To conclude, the evidence submitted by the claimant was more quantitative than qualitative. There was a lack of specificity which would relate the information to a particular claim or claims. Much of the evidence was general in nature and much of it, especially specific information, was hearsay where there was no opportunity for cross-examination and proper delineation of the purported facts shown. In some instances there was no foundation for some of the information. At the most, even as to the purported ore body on the Bonanza claim, it is apparent that further developmental and exploratory work was recommended. Appellant did not present evidence which would show that any ore bodies supposedly found prior to 1955 constituted valuable mineral deposits as of July 23, 1955, by establishing that a prudent man could expect that the value of the ore would exceed costs in developing the mine and hence could expect that a profitable mine might be developed.' This is the test for establishing a discovery in this case. . . ."

Of course, this affirmance in no way affects the validity of the mining claims as such. Plaintiffs retain the right to work their claims for mining purposes, and for all purposes incidental to mining. This affirmance only precludes the plaintiffs from using the surface resources of the claims in a manner which is not incidental to mining, until a patent is obtained. In other words, the claims remain subject to the right of the government to manage the surface resources, when not interfering with the mining.

The decision of the Secretary in each case must be affirmed.

DATED this 14th day of September, 1966.

John F. Kilkenny
District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

FORD M. CONVERSE,)	
)	
Plaintiff,)	
)	
v.	)	CIVIL NO. 65-581
)	
STEWART L. UDALL, Secretary)	
of the Interior,)	
)	
Defendant.)	
)	
INDEPENDENT QUICK SILVER CO.,)	
an Oregon corporation,)	
)	
Plaintiff,)	
)	
v.	)	CIVIL NO. 65-590
)	
STEWART L. UDALL, Secretary	)	ORDER
of the Interior,)	
)	
Defendant.)	

This cause is before the Court on plaintiffs' motion for a new trial on the Court's previous decision of September 14, 1966.

Independent Quick Silver again challenges the Government's method of sampling each of the twenty-two claims involved, it being claimed that there was a failure to prove a prima facie case by substantial evidence. It is urged that

the six samples of ore taken by the contestant all came from one of the twenty-two claims in controversy, viz: the Lost Mine Claim.

The evidence is contrary to the plaintiff's contentions. The Forest Service Examiners spent three days examining the claim and, in fact, examined all of the places shown to them by the plaintiff's representatives and took samples of all of the cuts that were open. Plaintiff is not in a position to now urge that all of the samples came from one claim when it was its own representatives who directed the Forest Service Examiners to where to obtain the samples. If, as here, a close scrutiny of the surface indicated that no cuts had been opened other than examined, then it seems rather clear that a mineral discovery had not been made.

Plaintiff again urges that the Assistant Solicitor of the Interior committed error in holding that certain testimony and reports were hearsay. The Solicitor stated, in passing, that much of the evidence was general in nature and that much of it probably, especially specific information, was hearsay where there was no opportunity for cross-examination. Although the Solicitor might have disregarded

some of the Hogg statements and the assays compiled by the geologist Westman, the fact remains that the Assistant Solicitor accepted all of this testimony and these records, but found that the evidence lacked specificity and showed only that further exploration was recommended. Plaintiff's real complaint is that the Solicitor did not give more weight to this evidence, rather than excluding it under the hearsay rule.

It is next urged that if the decision of September 14th is allowed to stand that the Court would be approving an administrative decision that the discovery of a body of ore containing 18,600 tons, with an average of 5.2 pounds of mercury per ton, would not be a discovery within the meaning of the mining law. There is nothing in the decision of the Assistant Solicitor, nor, for that matter, in any part of the record, which supports this argument. The Solicitor merely held that the plaintiff did not sufficiently prove that such a body of ore existed. In other words, the Solicitor resolved the issue of fact against the plaintiff.

I find nothing in the arguments of Quicksilver which would cause me to, in any way, modify my original opinion.

In the Converse case, it is argued that the original decision departs from the well settled rule of discovery and makes discovery depend on the name applied to the additional work which a reasonably prudent person would be justified in expending in both money and effort. It is argued that the Assistant Solicitor has altered the long-standing policy of the Department and now recognizes a distinction between the terms "discovery", "development" and "exploration". The record leaves little doubt that the Department has long recognized a sharp distinction between "exploration" and "development" in connection with whether a "discovery" has been made. For example, if one has found only enough mineral to justify further "exploration", as yet he has not made a "discovery", but if he has found enough mineral to justify a "development", then a "discovery" has been made. The opinion of the Assistant Solicitor is given complete support by United States v. Altman, et al, 8 I.D. 235, 237-8 (1961), from which I quote:

"There is, of course, a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found it is

often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are found of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made."

Additional support is added to the opinion of the Assistant Solicitor by United States v. Edgecumb Exploration Co., Inc., A-29908 (May 25, 1964).

Plaintiff fails to recognize that once the Government has established a prima facie case, the burden shifts to the claimant to show by a preponderance of the evidence that his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

The motion for a new trial in each case is denied.

IT IS SO ORDERED.

DATED this 30th day of November, 1966.

John F. Kilkenny
District Judge

No. 21700 ✓

IN THE
United States Court of Appeals
For the Ninth Circuit

NORMAN B. SATHER,
Appellant,

v.

GENERAL ELECTRIC COMPANY,
a New York corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

GRIFFIN, BOYLE & ENSLOW
CARSON F. ELLER
Attorneys for Appellant

Office and Post Office Address:
1535 Tacoma Avenue S.
Tacoma, Washington 98402

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APR 25 1967

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IN THE
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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered by the Honorable John C. Bowen, sitting without a jury, in favor of appellee. The jurisdiction of the District Court was based upon diversity of citizenship under 28 U.S.C. 1332. The jurisdictional allegation appears in Paragraph II of the Petition for Removal (R. 1) and paragraph I of the Findings of Fact (R. 49).

The jurisdiction of the Court of Appeals is based upon 28 U.S.C. 1291. Judgment for the appellee was entered December 19, 1966 (R. 53) and Notice of Appeal was given by the appellant on January 12, 1967.

STATEMENT OF THE CASE

Norman B. Sather has been selling General Electric appliances for fifteen years (Tr. 16). General Electric has been distributing appliances from their Tukwila plant, near Seattle, since December of 1961, when they first built their new warehouse (Tr. 98), and appellant has been picking up his appliances from that warehouse since that time (Tr. 47).

The appellee's warehouse has only one ramp to facilitate trucks wishing to load appliances (Tr. 111). The rampway is divided with a center line to designate two parking stalls for two vehicles at one given time (Ex. 1). Appellant used the right-hand parking stall because the left one was occupied or in the process of being occupied at the time the appellant went to park his vehicle (Tr. 18). Due to the narrowness of the rampway, there remained only 11½ inches of space in the parking stall on each side of the appellant's vehicle after he had parked. The rampway in question measures 15 feet, 9 inches from outside to outside. The two curbs, one on each side, take up an additional 10 or 11 inches, inasmuch as they are 5⅞ inches wide each, leaving 18 feet, 9 inches from the inside of the two curbs. The painted line down the middle of the rampway is in dead center, therefore, each

stall has 9 feet, 4½ inches of parking space. The plaintiff's vehicle is 7 feet, 5½ inches wide. Nine feet, 4½ inches equals 112½ inches and 7 feet, 5½ inches equals 89½ inches, the difference between the two being exactly 23 inches (R. 44). Assuming the appellant was in the middle of his individual stall, he would have 11½ inches on each side of his truck in which to walk.

Appellant, upon exiting from his truck, had but two ways to go; (1), to walk on the curb, as he did and always has done (Tr. 65); and (2), jump down from the top of the ramp, some thirty inches, onto cement and use the stairs after he was on the ground level (Tr. 104).

Appellant could not exit from the passenger's side of his vehicle for a number of reasons; (1) he had a gear shift and merchandise in the cab with him (Tr. 20); and (2) the other parking stall was in the process of exchanging vehicles (Tr. 81).

Appellant therefore by necessity elected to walk on top of the raised curb and consequently he fell and sustained serious and permanent injuries.

SPECIFICATIONS OF ERRORS

Appellant contends the District Court erred in the following respects:

1. In holding that the appellee owed no duty to the appellant as a business invitee to provide a safe place to load appliances;

2. In holding that the appellee was not guilty of willful

and wanton misconduct in the construction and maintenance of its loading ramp;

3. In holding that the appellant was guilty of contributory negligence;

4. In holding that the appellant assumed the risk of the dangerous condition;

5. In holding that the appellant had a reasonable alternative;

6. In holding that the appellee was free from negligence;

7. In reversing its findings and conclusions handed down at the conclusion of the trial and adopting the proffered findings and conclusions of the appellee, which were broader in scope and unsupported by the evidence, particularly as to the findings of:

- (a) assumption of the risk on the part of the appellant;
- (b) contributory negligence on the part of the appellant;
- (c) a reasonable alternate route available to the appellant;
- (d) a compliance with the uniform building code; and
- (e) an exercise of reasonable care on behalf of the appellee.

ARGUMENT

Appellant used the facilities provided by the appellee to the best of his ability. He makes his living selling Gen-

eral Electric products and must pick up his appliances at the appellee's warehouse, which is provided for that purpose. He either uses these facilities that are offered him or takes his business to Westinghouse or some other competitor. The latter alternative is not required in law, as it is an extreme alternative not required by a reasonably prudent man.

Part I

The District Court Erred in Holding That the Appellee Owed No Duty to the Appellant as a Business Invitee

At no place in the oral decision of the District Court was there a mention of the duty the appellee owed the appellant. The court reasoned in reverse on this point. It stated (Tr. 125) by implication there was negligence on the part of the appellee in not providing a loading ramp that could be used safely, but reasoned on the other hand that the appellant would not have been injured had he not come to Seattle that day. The court states that "All of the proximate causes and contributing causes of the accident and the resulted injury, none of them existed or became active before appellant's truck came into the loading ramp."

The reasoning of the court in the above quotation is like saying there is no danger in a vehicle without brakes until you drive it.

No mention was made of the appellee's duty to furnish a safe place to work. This duty is well known in legal precedent and is defined amply in 81 A.L.R.2d 750 in

an article entitled, "*Liability of Proprietor of Business Premises for Injury From Fall on Exterior Walk, Ramp or Passageway Connected With the Building in Which the Business is Conducted.*" The author in this article made the following observation in regard to the duty of a business proprietor to keep his premises in a safe condition for business invitees.

"It is a well established principle of the law of negligence that the proprietor of a store, shop or similar place of business owes a duty of reasonable care to keep in a reasonably safe condition those portions of the premises which he should expect will be used by his customers (see 38 Am. Jr. Negligence Section 131-133-134). It is also well recognized that a proprietor's obligation includes that of exercising ordinary care to keep his approaches, entrances and exits in a reasonably safe condition for the use of customers entering or leaving the premises. This principle is either stated or assumed in all the cases connected in this annotation."

An article in 95 A.L.R.2d 995 calls this duty "*Premises Liability*" and summarizes the duty of the premises owner towards those that are invited to use the premises, by saying:

"Elementary considerations of justice and public policy demand the imposition upon the landowner of the duty of care and corresponding liability for its breach."

The history and logic of the duty of the landowner towards the invitee as set forth in 95 A.L.R.2d 995, *supra*, is amply stated in the following quotations:

"During the eighteenth and nineteenth centuries

the common law developed, in various areas of tort law, a number of rather technical rules expressing the relationship between an actor and a sufferer which was felt to be necessary before tort liability could be imposed. The underlying theory was apparently that the person acting and the person suffering must be regarded as having in a sense 'contracted' with each other as to the care the one would take and the risks the other would assume, and from this theory grew various rules as to the necessity of privity between tortfeasor and injured party in some situations, as well as rules as to the assumption of risk by employees and others.

"Whether as the result of similar developments or not, there grew up, in the area of what is now called 'premises liability,' various rules classifying persons going upon the land of another according to their supposed relationship with the landowner, whose duty of care toward such persons while they were on his property varied according to the particular class into which the entrant fell.

"Traditionally, this classification has been into (1) trespassers, who entered without invitation or permission and were entitled to minimal care, (2) licensees, whose entrance was merely tolerated by the landowner, and who were entitled to a slightly greater degree of care than a trespassers, and (3) invitees, whose presence was actively desired and induced by the landowner, and who were entitled to have him exercise reasonable care for their safety while they were on the premises.

"Both the language and the concept of 'invitee' and 'invitation' caused considerable difficulty in the explication and application of the law, since the courts were reluctant to apply any strict rule of care with respect to maintenance of the premises in favor of social guests, even though the social visit might have been expressly invited or even strongly urged,

while on the other hand, there were a number of situations in which, while it was difficult to find any express or even implied invitation to come upon the premises, it was felt that elementary considerations of justice and public policy demanded the imposition upon the landowner of the duty of care and corresponding liability for its breach.

“Perhaps the clearest and most common case in which an actual or implied invitation can be found is that where the owner or occupant of the land has an actual financial or economic interest in the visit, and, probably as a reaction to the difficulties inherent in the ‘invitation’ concept, some courts and writers took the view that this was the only situation in which a technical invitation could be found, that is, that some economic benefit, real or fancied, was a necessary precondition of an invitation in this sense, and accordingly that an entrant upon the land of another was not entitled to the exercise of ordinary care to keep the premises in reasonably safe condition (was not an invitee), unless the purpose of the visit was more or less directly connected with the enhancement of some actual or supposed economic interest of the landowner.”

The trial court chose not to discuss this duty, much less hold that it had not been breached in the case at bar.

Counsel for the appellee saw fit to interject in his proposed conclusions of law that no duty had been breached on the part of appellee but this was not the findings of the trial court as can be seen from the court’s conclusion on page 124 and 125 of the transcript.

Appellant was clearly a business invitee. He meets all the tests used in Washington for determining the status of an individual on the property of another. The “economic

benefit test” is the major test when the landowner or defendant is in business. Authority for the economic benefit test is found in *McKinnon v. Washington Federal Savings & Loan Association*, 68 Wn.2d 640, where the court stated:

“Under this test (economic benefit) an invitee is one who is either expressly or impliedly invited onto the premises of another for some purpose connected with the business in which the owner or occupant is then engaged. To qualify as an invitee or business visitor under this definition, it must be shown that the business or purpose for which the visitor comes upon the premises is of actual or potential benefit to the owner or occupier thereof.”

Before the *McKinnon v. Washington Federal Savings and Loan Association* case, *supra*, the leading case in Washington on this subject was *Ward v. Thompson*, 57 Wn.2d 655, where the court stated:

“As to the matter of respondent’s legal status, it is amply clear, based on the undisputed facts, that respondent was a business invitee. It is generally acknowledged that an occupier of land owes a greater duty to invitees than to licensees, principally with respect to the inspection and discovery of hidden dangers and defects on his land. The problem is not so much what duties are owed to an invitee, but, rather, who qualifies as an invitee. Broadly speaking, there are two tests: (1) the economic benefit test, and (2) the invitation test. The test set forth in 2 Restatement, Torts, 897 Sec. 332, defines a business visitor as

“‘ . . . a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them.’

"This is generally interpreted to mean that some economic benefit (though it may be indirect) must be conferred upon the occupier by the visit. To date, the economic benefit test seems to have prevailed in this state.

"To attain the status of an invitee, this court held in the case of *Dotson v. Haddock*, 46 Wn.2d 52, 278 P.2d 338 (1955) that

"... it must be shown that the business or purpose for which the visitor comes upon the premises is of material or pecuniary benefit, actual or potential, to the owner or occupier of the premises."

"See, also, *Kinsman v. Barton & Co.*, 141 Wash. 311, 251 Pac. 563 (1926); *Christensen v. Weyerhaeuser Thr. Co.*, 16 Wn.2d 424, 133 P.2d 797 (1943); *Cf. Porter v. Ferguson*, 53 Wn.2d 693, 336 P.2d 133 (1959)."

"But aside from the technicalities of respondent's legal status, in our view, appellants owed a duty to maintain the scaffolding in a reasonably safe condition, and this duty extended to *all* persons standing thereon with the permission, express or implied, of appellants. By their very nature, any substantial defects in the construction of a scaffold necessarily involve recognizable risks of serious bodily harm to any persons standing on it. *Cf. Straight v. B. F. Goodrich Co.*, 354 Pa. 391, 47 A.2d 605 (1946). The duty of appellants to maintain the scaffold in a reasonably safe condition cannot be abrogated or altered on the basis of timeworn distinctions between licensees and invitees. *Cf. Mills v. Orcas Power & Light Co.*, 56 Wn.2d 807, 355 P.2d 781 (1960). Where the danger of harm is great, as it is with scaffolds, ladders, and the like, public policy requires that the occupier of the premises take the utmost precaution to keep such equipment in a safe condition."

The trial court stated there was negligence on the part

of the defendant but that “it did not become active until plaintiff’s truck came onto the ramp” (Tr. 125). If this was the test, no business invitor would have anything to worry about. The court is actually ruling that the appellant should have stayed home in bed and he would not have been injured.

Part II

The Court’s Second Error Was in Holding the Defendant Was Not Guilty of Willful and Wanton Misconduct in the Construction and Maintenance of Its Loading Ramp

Appellant, out of necessity, had walked on the curb many times before (Tr. 65).

Appellant’s Exhibit 1 shows an unidentified man walking the curb and it appears he had ample room between the curb and the truck to walk on the flat surface of the ramp. It stands to reason that the appellee knew or should have known the ramp as constructed was inadequate. Appellee, knowing this fact, plus the fact the ramp’s inadequacy was the result of original construction, makes appellee guilty of willful, wanton misconduct.

The test for determining willful, wanton misconduct is found in 38 Am. Jur., Section 178, where the author states the meaning of willful, wanton or reckless as:

“A defendant’s act is properly characterized as willful, or wanton, or reckless within the meaning of the foregoing rule, only when it was apparent, or reasonably should have been apparent to the defendant, that the results were likely to prove disastrous to the plaintiff and he acted with such an indifference to-

ward, or utter disregard of, such a consequence that it can be said he was willing to perpetrate it. The elements necessary to characterize an injury as willfully or wantonly inflicted are (1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another, and (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; and (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another.”

Using the above three tests, we find the appellant in the case at bar met all three elements.

(1), the appellant had knowledge by implication, if not actual knowledge, of the ramp’s inadequacy, as it had been built for four years (Tr. 98). (2), the appellant’s ability to avoid the situation was the simple installation of a guard rail. (3), the apparent danger was obvious to even a naive reasonably prudent man.

In respect to knowledge on the part of the appellee, as outlined in paragraph one above, the court’s attention is called to 65 A.L.R.2d 420, in an article entitled, “*Liability of Proprietor of Store, Office or Similar Business Premises for Injury From Fall on Ramp or Inclined Floor.*” At page 435 of this article under the subheading, “*Breach of Duty as Affected By Notice of Condition of Ramp Or Incline,*” the author states as follows:

“It may be of value to note in passing that an issue as to notice appears never to have arisen in a case in which it was claimed that the fall occurred because the ramp or inclined floor was *defective as*

a matter of its original construction. It would seem manifest that no proof of notice would be required with respect to such an inherent defect.”

The leading case of *Adkisson v. Seattle*, 42 Wn.2d 676, in defining wanton misconduct, stated:

“Wanton misconduct is not negligence, since it involves intent rather than inadvertence, and is positive rather than negative. It is the intentional doing of an act, or the intentional failure to do an act, in reckless disregard of the consequences, and under such surrounding circumstances and conditions that a reasonable man would know, or have reason to know, that such conduct would, in a high degree of probability, result in substantial harm to another.”

The appellant would then, under the above rules, be precluded from claiming contributory negligence on the part of the appellant even if same was shown.

The court therefore erred in finding for the appellee.

Part III

The Court Erred in Holding Appellant Was Contributorily Negligent

Although the court said nothing about contributory negligence in its concluding statement (Tr. 125), the appellee’s findings of fact and conclusions of law were adopted by the court when presented. It therefore is not known by the appellant from what portion of the evidence the court decided the appellant was contributorily negligent.

Appellant alleges there could be no contributory negligence, as appellant had no “reasonable alternative.”

Authority for the "reasonable alternative" requirement is found in the landmark case of *Kingwell v. Hart*, 45 Wn.2d 401, at page 405, where the court states as follows:

"Contributory negligence or unreasonable conduct on the part of the plaintiff in view of the foreseeable risk, may be confused with the latter defense, where no real consent to relieve defendant of any duty can be found, but plaintiff has exposed himself voluntarily to an appreciated and known unreasonable risk. In other words, an added inquiry appears of contributory negligence also is asserted, that is, was plaintiff's own conduct under the circumstances unreasonable, in view of the foreseeable risk, so that it can be said that there was breach of duty on the part of the injured person."

"It follows that the inquiry in a tort case presenting the issues raised on this appeal, may include three questions: Did plaintiff (1) know of and appreciate the danger or risk involved and also (2) did he voluntarily consent to expose himself to it (*'voluntarily' including the meaning that defendant's conduct has left plaintiff a reasonable election or alternative*) . . . and (3) was the exposure unreasonable, that is, was it such that a reasonable person in plaintiff's position would expose himself to it, or, after accepting a reasonable risk, did plaintiff exercise proper care for his own protection against that risk."

It is clear that the appellant had no reasonable alternative. If he was to load appliances, he had to use this particular ramp. And by using the ramp he had no place to go when he exited from his truck, except to walk the curb (Tr. 65).

Appellee attempts to make it appear as if the appellant could walk down the inclined portion of the raised curb

and reach the ground level, thus giving him access to the stairway (Tr. 65 and 66) but as the appellant explained in his testimony, he thought it safer to walk a level curb rather than an inclined curb if he was forced to walk a curb at all (Tr. 66). In addition, to walk down the inclined curb would require the appellant to negotiate around his door and mirror of his truck (Tr. 66), an act which, in the minds of reasonable men, would not be safe while perched atop a five-inch curb, thirty inches above a cement parking lot (Tr. 66).

At no place in the appellee's evidence was there a suggestion of a reasonable alternative. The only alternative was to pull the truck off the ramp. This is not a reasonable alternative. Appellee placed the ramp and warehouse at the appellant's disposal and the appellant makes his living selling General Electric products (Tr. 16). It is not reasonable to ask appellant to go elsewhere for his appliances.

The only other alternative the appellant had was to jump off the ramp onto the cement parking lot and then use the stairs (Tr. 102, 103, 104). Appellee's witness, Steiner, stated on cross-examination, the only two ways the appellant could have gotten into the warehouse was to (1) jump off the ramp or (2) walk down the incline and use the stairs (Tr. 104). But, appellant under cross-examination (Tr. 65), states there was not enough room to walk down the incline, as his truck, by necessity, was parked too close to the curb and he would have to walk on top of the incline. Instead, he chose to walk on top of a level curb.

The pretrial order (R. 43) contains all the necessary measurements. These measurements show that the loading ramp was too narrow. When the appellant parked his truck in the right-hand stall, he had 23 inches of space left. In other words, due to the narrowness of the rampway, appellant, by utilizing only the one stall, the presence of another truck or vehicle preventing any other course of action, found himself with inadequate room to reach his goal without walking on top of the curb.

The appellant argues that the proximate cause of the accident was the inadequate facilities of the appellee. The appellee failed to build an adequate rampway or it failed to make the one in existence safe by the use of guardrails.

In looking for another alternative, the *Reeder v. Sears, Roebuck Company*, 41 Wn.2d 550 is cited. It is a case involving injuries suffered by the plaintiff when the ramp of the defendant collapsed. The defendant in this case attempted to escape liability under the theory that the plaintiff had an alternate route or entrance to the store or warehouse. The court properly rejected the proposed instructions to that effect and stated:

“From appellant’s photographs and other evidence, the jury could have found that the ramp was the only *reasonable and convenient means of entrance* to the rear of the building and that respondent had been invited to use it.”

In the case at bar we have no other alternative, much less a “*convenient*” one.

Section 134 of Volume 38, Am. Jur., adequately de-

scribes the appellee's duty to the appellant in discussing *Approaches, Entrances and Exits*, where the general rule of the proprietor's duty towards business customers is as follows:

"However, the owner of a public place of business who leaves a dangerous condition upon his premises cannot avoid liability for injury to one who, coming upon the premises on lawful business, is injured by coming in contact therewith, on the theory that it was not in the path which he was entitled to travel, if it was so close thereto that he *could not transact his business without coming in such proximity to the dangerous condition* as to render it perilous to him." (Emphasis supplied)

It is quite apparent in the case at bar that the appellant here could not "*transact his business without coming in such proximity to the dangerous condition* as to render it perilous to him."

It has been argued before that to require the appellant to go elsewhere is not required in law. The case of *Rush v. Commercial Realty Company*, Supreme Court of New Jersey, 1929, 141 Atlantic 476, was a case involving a suit tendered against the landlord where the tenant had fallen through the defective floor of an outdoor privy.

"In such a situation it would seem that the argument for a non-suit must be restricted to the question of contributory negligence and assumption of risk. In dealing with these, it should be observed that Mrs. Rush had no choice, when impelled by the call of nature, but to use the facilities placed at her disposal by the landlord, to-wit, a privy with a trap door in the floor, poorly maintained. *We hardly think this was the assumption of a risk; she was not*

required to leave the premises and go elsewhere."

In other words, the court is saying that even though the appellant recognized the dangerous condition he was not required to go elsewhere. He could use the facilities to the best of his ability.

The test that is applied to the appellant's conduct is that an ordinary prudent person would have done under the circumstances. Volume 38 Am. Jur., Section 190. This section is entitled "*Degree and Standard of Care*" and states as follows:

"The measure of care required of a person in the interest of his own safety is ordinary or reasonable care, according to the circumstances of the case."

"Contributory negligence is to be determined, not according to what the plaintiff or decedent might have done, but according to what a reasonable person would have done under the circumstances."

"The standard by which the conduct of the plaintiff is judged is the conduct of ordinarily prudent persons under like or similar circumstances, conditions and surroundings."

Section 193 of Volume 38 Am. Jur., states as follows:

"However, one is not always chargeable with negligence, even though he does not adopt the safest and best course to avoid injury. The law does not require a choice unerring in the light of after events; it requires such a choice as, under all the known or obvious circumstances, a reasonably prudent man might make."

Section 182 of Volume 38 Am. Jur., entitled "*Exposure to Peril*" gives us the following definitions and tests in

looking for the duty of an injured party:

“Exposure to known danger, however, is not always contributory negligence.

“Even the most prudent man is sometimes compelled to take risks; at least some risk is inherent in the ordinary activities of life.

“It has been said that the taking of a risk is negligent, only when the risk is greater than is reasonably necessary to meet the ordinary requirements of business, or even pleasure.

“The fact that one who took a risk took it in the performance of duty is entitled to great weight in determining whether his conduct was negligent.”

An article in 61 A.L.R.2d 174, entitled “*Liability of Proprietor of Store, Office or Similar Business Premises for Injury or Fall Due to Litter or Debris on Stairway*,” at page 199, it is suggested that contributory negligence or assumption of risk is not available to business proprietors for injuries sustained on falls on stairways due to litter. This article therefore strongly infers a greater duty upon a business proprietor than is heretofore seen.

Part IV

The Court Erred in Holding Appellant Assumed the Risk

Here, again, the words “assumption of risk” were not used by the trial judge (Tr. 125). Assumption of the risk was a defense of the appellee introduced in the findings.

Assumption of the risk and contributory negligence under circumstances such as these are treated synony-

mously in Washington. *Nelson v. Booth Fisheries Company*, 165 Wash. 521, states:

“In the latter relation of proprietor and invitee, denial of recovery is, in like circumstances, usually rested upon the principle of contributory negligence, although this court has, at times, spoken of it as the assumption of a risk.”

Therefore, arguments of the appellant pertaining to lack of contributory negligence would and should be considered equally for determining the issues of assumption of the risk.

Part V

The Court Erred in Holding the Appellant Had a Reasonable Alternative

At no place in the appellee's evidence was there a suggestion as to what appellant should have done differently. Appellee's entire case hinges on the appellant's method of gaining access to the appellee's warehouse. At no place did they suggest what he could have done differently.

Figures set forth in the pre-trial order (R. 43) make it apparent that the appellant had no room to walk after parking his truck. Appellee does not dispute this. Appellee attempts to make it appear the appellant could have walked down the ramp to the ground level (Tr. 65) but appellant's explanation makes it obvious the route he chose was safer than the suggested route. As explained before, if the appellant, by the negligence of the appellee, had no place to walk except on top of a five-inch curb, it is safer to walk a curb that is level

rather than one that is slanted. This, plus the hazard of the door and the mirror (Tr. 65, 66), makes the appellant's selected route the obvious one a reasonable and prudent man would have selected.

It is noted the appellee did not suggest that appellant should have jumped down off the ramp. Appellant, after all, was fifty-one years old and weighed 210 pounds (Tr. 21).

Nor does the appellee suggest the appellant should have left or drove his truck off the ramp. The judge did, but not the appellee. This cannot be the law; otherwise, the duty of a business proprietor to furnish a safe place for a business invitee would be abrogated. The courts would then simply say the business invitee should have stayed in bed.

Part VI

The Court Erred in Holding the Appellee Was Free From Negligence

The duty of the appellee to furnish a safe place for the appellant to transact his business has been previously discussed under alleged error Number II.

Part VII

The Court Erred in Adopting the Proffered Facts and Conclusions of the Appellee, Which Were Inconsistent With the Oral Decision of the Court

By so doing, the appellant is denied an opportunity to discuss the court's ruling on appeal. The court said

nothing about assumption of the risk, or even the duty of the appellee to provide a safe place for the appellant to transact his business.

CONCLUSION

Appellant used the facilities of the appellee to the best of his ability. He had no reasonable alternative but to pursue the route that subsequently caused his injury.

The failure of the appellee to furnish a safe place for the appellant as a business invitee to load his appliances, was the proximate cause of the accident. Appellant therefore respectfully requests this court to reverse the ruling of the District Court and award the appellant the damages set forth in his prayer.

Respectfully submitted,

GRIFFIN, BOYLE & ENSLOW

CARSON F. ELLER

Attorneys for Appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

April 1967

CARSON F. ELLER

Of Counsel for Appellant

APPENDIX A

<i>Exhibit Number</i>	<i>Offered</i>	<i>Received</i>
Plaintiff's A-1	R. Tr. 15	R. Tr. 16
Plaintiff's A-2	R. Tr. 15	R. Tr. 16
Defendant's A-1 through A-8	R. Tr. 52	R. Tr. 52

No. 21700

IN THE
United States Court of Appeals
For the Ninth Circuit

NORMAN B. SATHER,
Appellant,

v.

GENERAL ELECTRIC COMPANY,
a New York corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN
FREDERICK V. BETTS

Attorneys for Appellee

Office and Post Office Address:
1020 Norton Building
Seattle, Washington 98104

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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

ADDITIONAL STATEMENT OF THE CASE

On October 11, 1965, about 11:00 a.m., when the weather was dry, the appellant backed his 1964 Ford van truck onto appellee's truck loading ramp. He intended to pick up some appliances. He had followed this practice when getting appliances at the General Electric warehouse at Tukwila near Seattle, Washington, once to twice a week from several years prior to this incident. The warehouse was built in 1961. The driveway or truck loading ramp where the appellant parked his truck was constructed in compliance with the City of Tukwila Building Code in existence at the time of the construction of the building. After parking his truck the appellant saw fit to walk on a curbing alongside the ramp toward the

loading platform. When part way to the platform his foot slipped off the curb. The appellant did not know what caused him to slip (Tr. 60). The appellant said that there was no obstruction on the curbing at all. There was no foreign substance and it was dry (Tr. 51). The appellant chose to take this course rather than walk off the ramp and use the stairs provided to get onto the loading platform. The appellant was thoroughly familiar with the premises. He now seeks damages for the injuries he sustained when he slipped.

The incident occurred on the east side of the warehouse on a two-lane ramp running in a general easterly and westerly direction. After appellant had backed his truck against the loading platform, he got out on the left side and proceeded toward the loading platform as above indicated.

The width of the driving surface of the ramp is 18 feet 9 inches, not 15 feet 9 inches as stated in appellant's brief, thus allowing 9 feet 4½ inches for each half of it. There is a white centerline dividing the two halves. The entire area, including the two halves or parking lanes on the elevated ramp, was unoccupied at the time the appellant parked his truck. The van of the appellant's truck was 6 feet 6½ inches in width, thus leaving 2 feet 10 inches in which to maneuver the truck, without imposing upon the adjoining half of the ramp. The driving surface of the ramp is 23 inches above the ground level, while the curbing is 8 inches, thus making a total of 31 inches from the top of the curb to the ground level.

The appellant had driven his truck upon this ramp and picked up merchandise at the warehouse, approximately

once or twice a week for the last three years (Tr. 17, 47). It had been his practice in the past to walk along the curb as he was doing on the day of the accident.

The appellant's witness, Lester Nelson, stated in an affidavit on October 5, 1966, that both lanes on the ramp were empty when the plaintiff started backing up (Tr. 85).

After the truck was parked, the appellant left the vehicle by its left front door, thus placing himself on the north side of the ramp. He states that he did not get out of the right side of the cab because of merchandise he had previously placed on the right seat (Tr. 20). After he left the cab he stepped onto the curbing. He started toward the building. He went a few steps, three or four, and then returned to the truck for some papers. Thereafter he started walking back toward the building, during which time he was putting the papers into his inside shirt pocket (Tr. 118). He had gone approximately half way to the building when his foot slipped off the curb, and he fell (Tr. 57).

Customarily the appellant parked his truck in the same lane as it was in at the time of this accident and customarily he walked back toward the building on the curbing. For three years prior to this time he had never had any other trouble. Although he had papers in his hands he claims to have been walking straight ahead and looking downward, and had no difficulty seeing where he was walking (Tr. 51).

The appellant testified he could have gone down the ramp to the ground level and then used the stairs to get onto the loading platform (Tr. 50). He chose to go by

way of the curbing as it was easier than going down the ramp (Tr. 66). On this occasion he did not remember if he supported himself against the side of the vehicle.

William P. Steiner, Manager of Operations of the warehouse reached the scene of the accident immediately after its occurrence and heard the appellant say that his falling was due to his own carelessness (Tr. 100). It was stipulated at the trial that if the witness Roland Schmitt was called, he would testify the appellant made such a statement in his presence (Tr. 121).

As previously indicated the appellant testified that he did not know why he fell or what caused him to fall. He further stated that his slipping off the curb was an accident (Tr. 123). He admitted there were no obstructions on the curbing and there was no foreign substance on the cement. It was a dry day (Tr. 51).

ARGUMENT FOR APPELLEE

Throughout the appellant's brief he has referred to the alleged variation between the court's oral decision and its Findings of Fact and Conclusions of Law and designates this as the seventh specification of error. The courts generally have held that an oral decision is pre-empted by the entry of Findings of Fact and Conclusions of Law. The following Washington cases are in conformity with the general rule. In *Landry v. Seattle P.A.&W.R. Co.*, 100 Wash. 453, 171 Pac. 231, it was contended the court had no power after orally deciding a motion, to overrule its oral decision. The court said:

" . . . We think it has been fairly settled by the decisions of this court that the formal judgment as entered is the judgment of the court, irrespective of memorandum opinions or minute entries, excepting,

of course, a judgment entry made by the clerk under the statute directing that such judgment should be entered by the clerk in cases tried by a jury."

In *Quigley v. Barash*, 135 Wash. 338, 237 Pac. 732, it is said:

"Some contention is made that the trial court at the close of the testimony gave an oral decision adverse to its written findings. The court's oral decision was not a finding of fact, and under our repeated decisions the final ruling was 'within the breast of the court' until it entered its formal findings."

And in *Ritter v. Johnson*, 163 Wash. 153, 300 Pac. 518, the Washington court again said:

"Appellant first contends that the court erred in entering judgment in respondents' favor, having once orally announced a decision in the appellant's favor to the effect that the action would be dismissed. No judgment having been entered, the court was at liberty to change its ruling, and no error can here be predicated upon the fact that such change was made."

In *McClelland v. McClelland*, 170 Wash. 170, 15 P.2d 941, at page 174 the court said:

"The purpose of the memorandum decision was to guide counsel in the preparation of findings of fact and conclusions of law and the final order. Until such instruments were signed the disposition of the cause was subject to the conscience of the court and the trial court did not err when it struck from the files its memorandum decision and thereafter entered an order inconsistent therewith."

In the case at bar Judge Bowen remarked in his oral decision that:

"The court will settle and enter appropriate findings, conclusions and judgment in this case on December 19, 1966" (Tr. 125).

Clearly the oral opinion, which was very short, was not intended to be findings of fact and conclusions of law.

Findings and Judgment Are Presumptively Correct and Are Not to Be Set Aside Unless "Clearly Erroneous"

Rule 52(a) of the Federal Rules of Civil Procedure, provides in part as follows:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . . Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

In *Wick v. Keshner*, 244 F.2d 147, the Eighth Circuit held that a district court's findings are presumptively correct and would not be disturbed unless clearly erroneous. To the same effect is *Fix Fuel & Material Company v. Wabash Railroad Co.*, 243 F.2d 110.

In *Bloom v. United States*, 272 F.2d 215, this court said:

"We do not sit to second guess the trial court, nor do we have power to do so under Rule 52(a) . . ."

It was further stated:

"On appeal such finding of the trial court cannot be set aside unless it is 'clearly erroneous' under the doctrine of *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525, 92 L.Ed. 746 (1948). As this court said in *Overman v. Loesser*, 9 Cir., 205 F.2d 521, 524 (1953), certiorari denied 1953, 346 U.S. 910, 74 S. Ct. 241, 98 L.Ed. 407, 'Since the finding involved the credibility of witnesses, and since it is supported by substantial evidence, it is conclusive upon appeal.'"

And in *Western Surety Company v. Redman Rice Mills, Inc.*, 271 F.2d 885, 890:

“The major or basic point stressed by appellants is that ‘there was no evidence that defendant was guilty of negligence in any respect in the performance of its duties under the Uniform Rice Storage Agreement.’

“We preface our discussion of this contention with the observation that these cases were tried to the court without a jury. This brings into play Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A., which provides that ‘findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .’

“‘The findings of fact of a trial judge sitting without a jury should not be set aside unless it is clearly demonstrated that they are without adequate evidentiary support in the record or were induced by an erroneous view of the law.’”

Jennings v. Murphy, 194 F.2d 35, was a case involving personal injuries arising out of an automobile accident. There the rule is stated as follows:

“We need not advert to citation of authority that under the procedure prescribed for United States Courts, the function of deciding all questions of fact is that of the jury or, in the absence of a jury trial, that of the trial court and that this rule has its reason and foundation not only in the constitution but also in the fact that those who see and hear witnesses are much better equipped to weigh the evidence and determine the credibility to be extended to those testifying than are the judges of the courts of review who do not enjoy the same advantages. Under no circumstances are we authorized to reverse findings of fact unless they are clearly erroneous. Federal Rules of Civil Procedure, Rule 52(a), 28 U.S.C.A.”

The case of *United States v. Stoppelmann*, 266 F.2d 13, involves a tort claim against the government, wherein it was stated:

“There is little or no dispute as to the basic facts in this case, but the conclusions and inferences drawn from these facts are challenged by defendant as being unwarranted by the undisputed evidence. The findings of the court are presumptively correct and should not be set aside on appeal unless clearly erroneous or based upon an erroneous view of the applicable law. . . . In considering the question of the sufficiency of the evidence to sustain the findings, the evidence must be viewed in a light most favorable to the prevailing party, and the prevailing party is entitled to the benefit of all such favorable inferences as may reasonably be drawn from the facts proven. The trier of facts, whether court or jury, is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and on appeal all conflicts in the evidence will be presumed to have been resolved in favor of the prevailing party.”

See also *Petri v. Rhein*, 257 F.2d 268, *Boernhoeffer v. United States*, 190 F.2d 358, and *Hoyt v. General Insurance Company of America*, 249 F.2d 589 (Ninth Cir).

ARGUMENT IN ANSWER TO APPELLANT

Answer to Part I of Appellant's Brief, Page 5

The appellant complains that there was no mention by the District Court of the duty the appellee owed the appellant. He asserts in his brief that he was a business invitee. We agree with the latter assertion; so did the trial court. He specifically found in Finding VI that:

“The plaintiff was a business invitee at the time of the accident referred to in his complaint.”

Appellant's complaint that the trial court did not mention the duty the appellee owed the appellant is unwarranted. The trial court's findings contained in Paragraph V are succinct and clear. The court specifically found that the appellee had exercised reasonable and ordinary care in connection with the matters of which the appellant complains.

It found that the ramp or driveway was built in compliance with the Building Code of the City of Tukwila. It found:

"That the defendant exercised reasonable and ordinary care in the design, building, construction and maintenance of said inclined driveway."

Thus, it is clear that the court did recognize that there was a duty on the part of appellee to maintain its place of business in a reasonably safe condition. The court even stated in its oral decision that:

"No danger existed before and no negligent or wrongful act was done by the defendant before or after plaintiff's truck came in to the loading ramp."

(Tr. 125). The court, in its Findings Nos. V and VI, found the building was in all respects reasonably safe. That finding was supported by the testimony of the appellant who used the premises in the same way for over three years, twice a week, and even on the day of the accident he could find nothing wrong or unusual from what he had seen and observed before. The court also made the finding that the inclined driveway was not of such a degree as to require any hand rails and as the court affirmatively stated:

"Reasonable and ordinary care was exercised by the appellee."

Appellee's Answer to Part II of Appellant's Brief, Page 11

Appellant takes the position the court erred in "holding the defendant was not guilty of willful and wanton misconduct in the construction and maintenance of its loading ramp." How can appellee be guilty of willful and wanton misconduct in reference to the construction and maintenance of the loading ramp when its design was approved by the authorities of the City of Tukwila, and the building had been used for over three years prior to the accident in question with no evidence of any prior injuries or complaints? There was never a complaint from the appellant who had used it some 300 times before this accident without difficulty. The entire area was open and apparent and there was nothing hidden or concealed. As is stated by the trial court, no danger existed before the appellant drove onto the ramp.

Appellant cites the case of *Adkisson v. Seattle*, 42 Wn. 2d 676, 258 P.2d 461, for its definition of wanton misconduct as being:

"the intentional doing of an act or the intentional failure to do an act in reckless disregard for the consequences."

There is a complete absence of any evidence that would even suggest the conduct referred to in the quote. Willful or wanton misconduct is not even remotely related to this case. On page 12 of the brief, the appellant argues that appellee had actual knowledge of the ramp's alleged inadequacy. It had served satisfactorily for the prior three years without complaint by anyone. Appellant also argues the apparent danger was obvious to even a naive, reasonably prudent man. If that is so, then it should

have been just as obvious to the plaintiff, and as a reasonably prudent man he should not have made use of it, or at the very least, he should have called it to the appellee's attention rather than to use it two times a week for a period of three years. It is interesting to note the appellant stated that he had no idea of the cause of his fall, but that it was simply an accident.

In the case of *Ranniger v. Bryce*, 51 Wn.2d 383, 318 P.2d 618, Washington Supreme Court said:

“Wanton misconduct is not negligence. It requires the intentional doing of an act or the intentional failure to do an act, as distinguished from negligence, which is predicated upon the wrongdoer's carelessness, recklessness or inadvertence.”

Certainly there was no evidence to support a charge or claim of wanton misconduct.

Appellee's Answer to Parts III and IV of Appellant's Brief, Pages 20 and 21

The appellant claims the court erred in holding that he was guilty of contributory negligence and assumed the risk. The court in Paragraph VI of the Findings of Fact found:

“He was guilty of negligence which was the sole proximate cause of the accident. That if the plaintiff was in fact required to walk upon the curbings along the north side of said driveway that resulted only because of the plaintiff's positioning his vehicle too close to the edge; that he was negligently using the curbing as a walkway rather than the surface of the inclined driveway, that he assumed whatever risks there may have been in walking upon this curbing and that he failed to use reasonable and ordinary care in observing the area where he was walking.”

It must be remembered the appellant was fully knowledgeable of the appellee's premises. He had gone that way hundreds of times before. The premises remained unchanged. There was no impairment; there were no foreign objects on the ground. The dangers, if any, were created by the activities of the appellant.

He had the opportunity of parking his truck in either the north or south lane. He chose to park it in the north lane. He had the choice of getting out of either side of his truck cab. He had the choice of walking a few steps down the sloped ramp approach in front of his parked truck and then proceeding on the level to the steps leading up to the loading platform. He chose to walk on the 5½ inch curb. According to the testimony of a disinterested witness, he chose to preoccupy himself with papers and a notebook and to proceed to put these papers in his shirt pocket while he was walking along the curbing. With this testimony before him, it is easily understood why the court found that the appellant was guilty of contributory negligence.

CONCLUSION

The Findings of Fact, Conclusions of Law and Judgment are supported by the record. The court's findings should not be disturbed because they are proper, logical and consistent with all of the evidence. Certain it is that there is nothing in the record to support any claim that the trial court's Findings were "clearly erroneous." It follows that the judgment of the trial court should be affirmed.

Respectfully submitted,

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN
FREDERICK V. BETTS

Attorneys for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FREDERICK V. BETTS

Of Counsel for Appellee

No. 21702

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COURTESY CHEVROLET, INC., a corporation,

Appellant,

vs.

TENNESSEE WALKING HORSE BREEDERS' AND EXHIBITORS' ASSOCIATION OF AMERICA, a corporation,

Appellee.

PETITION FOR REHEARING.

FILED

MAY 16 1968

WARD, HEYLER & DRUTEN,

1901 Building, Suite 1475,

Century City,

Los Angeles, Calif. 90067,

Attorneys for Appellant and Petitioner.

WM. B. LUCK, CLERK

No. 21702

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

COURTESY CHEVROLET, INC., a corporation,

Appellant,

vs.

TENNESSEE WALKING HORSE BREEDERS' AND EXHIBITORS' ASSOCIATION OF AMERICA, a corporation,

Appellee.

PETITION FOR REHEARING.

To the Honorable Chief Justice and the Associate Justices of the United States Court of Appeals for the Ninth Circuit:

The appellant, Courtesy Chevrolet, Inc., presents this petition for a rehearing of the above cause and, in support thereof respectfully shows:

1. The appeal in the cause was argued before this Court on April 9, 1968.

2. On April 16, 1968, this Court rendered its decision affirming in part and reversing in part and remanding with directions the judgment of the United States District Court for the Central District of California.

3. The appellant seeks a rehearing upon the following grounds:

a. The Judgment of the Court of Appeals fails to consider the question of whether, as a matter of law, plaintiff's evidence of damage is in fact "too indefinite and speculative to permit the Court with any degree of certainty to estimate the amount thereof."

b. The Judgment of the Court of Appeals does not consider whether there was sufficient evidence and relevant data presented to the District Court upon which that Court should have made a reasonable estimate of damages as prescribed in *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.* (6th Cir. 1966) 358 F. 2d 790, 793 and *Flintkote Company v. Lysfjord* (9th Cir. 1957) 246 F. 2d 368, 392.

c. No determination was made by the Court of Appeals regarding the failure of the District Court to consider or award attorneys' fees for plaintiff's prior attorneys through the time of their prior successful appeal.

d. No determination was indicated by the Court of Appeals regarding plaintiff's application for attorneys' fees in the Court of Appeals.

e. The Court of Appeals did not set forth any guidelines upon which it could be determined how the Court related injunctive relief obtained to damages recovered thereby arriving at an attorneys' fee of \$10,000, although the evidence was that such fees should be \$140,000 to \$150,000.

f. It cannot be determined from the Court's opinion whether it is determining that an award of attorneys' fees in anti-trust litigation must be apportioned between equitable relief and damages awarded.

g. The Court of Appeals has not met the issue of whether the District Court acted properly in failing to determine a reasonable attorneys' fee for plaintiff but instead ruled that the test was what portion of such fees should be borne by the defendant.

h. The Court of Appeals did not rule on appellant's application for attorneys' fees in the Court of Appeals.

i. It cannot be determined from the opinion and judgment of the Court of Appeals how costs on appeal are to be charged or apportioned.

For the foregoing reasons, it is urged that this petition be granted.

Dated: May 15, 1968.

Respectfully submitted,

WARD, HEYLER & DRUTEN,

GUY E. WARD,

Attorneys for Appellant and Petitioner.

I hereby certify that the foregoing petition is submitted in good faith and not for purpose of delay.

GUY E. WARD,

Attorney for Appellant and Petitioner.

No. 21704

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DON THE BEACHCOMBER,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S OPENING BRIEF.

FILED

SWEENEY, COZY & FOYE,

AUG 25 1967

M. J. DIEDERICH,

WM. B. LUCK, CLERK

639 South Spring Street,
Los Angeles, Calif. 90014.

Attorneys for Don The Beachcomber.

W. B. Luck

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No. 21704

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DON THE BEACHCOMBER,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S OPENING BRIEF.

Jurisdiction.

This case is before the Court upon the petition of Don The Beachcomber pursuant to Section 10(f) of the National Labor Relations Act, as amended, for review of an order of the National Labor Relations Board, issued March 7, 1967. The decision of the Board and order are reported at 163 NLRB No. 36. This Court has jurisdiction of the proceedings as the unfair labor practices charged were alleged to have been engaged in at Palm Springs, California, where petitioner operates a restaurant. The Board, in its answer to the petition, admits the jurisdiction of this Court. No jurisdictional issue is presented by this case. In addition to its answer, the Board has filed a cross-petition seeking enforcement of its order. The applicable portion of the Act is found at 61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*

Statement of the Case.

Petitioner operates two well-known restaurants, one in Hollywood and another in Palm Springs, California.

On March 8th or 9, 1966, the union (Culinary Workers, Bartenders and Hotel Service Employees Local 535, AFL-CIO) made a demand for recognition, claiming an "overwhelming majority of your employees have signed authorization cards for us to represent them." [General Counsel's Ex. 4.]

No further reference described the unit of employees the union claimed to represent.

The union requested an appointment within ten days to discuss an agreement on behalf of "your employees" at Don The Beachcomber in Palm Springs.

However, on March 15, 1967, before the ten-day period had expired, the union filed a petition with the Board seeking a Board-conducted election. Petitioner's reply to the demand also suggested an election. [See General Counsel's Ex. 5.]

Nash Aranas was the Service Manager for both the Hollywood and Palm Springs restaurants. He was responsible for supervising the waiters and buy boys, by tradition (including Aranas), of Filipino extraction. [R. T. 313.]

Aranas usually spent the weekends at the Palm Springs restaurant. After the demand was received, on the next weekend, Aranas asked Federico Nobello, a Filipino bus boy, if he had signed a piece of paper. Nobello said he had. On cross-examination, Nobello testified Aranas told him he did not know if he could take him to Hollywood to work after the Palm Springs season because there was no union at Hollywood and

he did not know if someone from a union restaurant could work in a non-union restaurant. [R. T. 106.]

Later, Aranas learned this situation presented no conflict and Nobello was taken to Hollywood to work after the end of the Palm Springs season. [R. T. 106, 360-361.]

Aranas also asked Ben Jordan, a waiter and also his brother-in-law and friend of many years, if he had signed a card. Jordan said he had, and suggested holding a meeting of "the boys" at his home so Aranas could come and hear from them why they had signed cards. [R. T. 303-304.]

A meeting was called by Jordan and held in the living room of Jordan's house. [R. T. 146.] It was attended by 15 or 16 Filipino bus boys or waiters, most of whom Aranas had known for many years. It lasted for approximately two hours. Coffee was served, many of the boys either dozed off or chatted in the kitchen at one time or another.

There was a general discussion in which many of the boys stated the reasons for signing cards.

At the meeting, Aranas told the boys they could join the union if they wished, but they should talk about it. He pointed out what he believed to be the disadvantages of joining. [R. T. 108, 145.]

The hours worked by the waiters and bus boys were not firmly fixed. Many of them worked 6 or 7 days a week, and because much of their income was derived from tips, it was to their advantage. Aranas told them the union might want overtime pay and the restaurant might not be able to afford it, so they might end up working fewer days each week. [R. T. 264-265.]

The waiters followed a double rotation system. There were some waiter stations that were better than others. The older waiters rotated on these better stations while the younger waiters rotated on the other stations. Aranas told them the union might want all of the waiters to rotate together. [R. T. 266-269, 356.]

The main union witness, Leonard Mandapat, testified that after the meeting, Aranas approached him and stated, "so you are one of the union organizers." After a suggestion the statement was not coercive and some prodding, he then remembered Aranas had also said "you boys are crazy, you don't know what you are going to be missing if you join the union." Aranas denied the conversation. [R. T. 183-184, 364.]

Mandapat also testified Aranas, on another occasion, told him he was afraid the boys were going to lose their jobs if they supported the union. Aranas denied the statement. [R. T. 364.]

Mandapat also testified Aranas told him there was no chance for him to work in Hollywood. Aranas denied the statement. [R. T. 364.]

The unit was comprised of 52 employees. At the hearing, General Counsel, over objection, placed 26 authorization cards into evidence and testimony that Jok Chan, a cook, was a dues-paying member of the union. This was the "overwhelming majority" claimed by the union.

Hanning testified she did not know any of the people who purportedly signed the cards, except Tana, and that she had no first-hand knowledge that four of the cards

which she attempted to authenticate had been signed by the purported signatories. [R. T. 30-40.]

Tana testified that he did not see one of the cards he secured signed. [R. T. 120.]

Mandapat's attempt to authenticate the cards must be read to be appreciated. It is replete with conflicting statements, changes in testimony and inconsistencies. [R. T. 220-257.]

The Trial Examiner and the Board accepted the cards, credited Mandapat, found Aranas had violated Section 8(a)(1) of the Act, and held Petitioner had refused to bargain in good faith. Its order directs Petitioner to recognize and bargain with the union.

Specification of Error.

1. The Board erred in admitting into evidence union authorization cards.

2. The Board erred in finding that Jok Chan had authorized the union to act as its bargaining agent in connection with his employment at Don The Beachcomber.

3. The Board erred in crediting Leonard Mandapat in the face of obviously false affidavits on his part.

4. The Board erred in holding Aranas violated Section 8(a)(1) of the Act, as amended.

5. The Board erred in finding that Petitioner had no good faith doubt about the union's alleged majority.

6. The Board erred in finding that Petitioner violated Section 8(a)(5) of the Act, as amended.

ARGUMENT.

1. The Authorization Cards.

Petitioner submits it was grossly unfair to admit any authorization cards into evidence, except those identified by the purported signatories.

General Counsel knew well in advance of the hearing which employees he would attempt to prove signed cards and it would have been no hardship for him to produce such employees at the hearing.

Petitioner, on the other hand, had no knowledge of what cards would be presented until the hearing began.

After the hearing commenced and the names became known, it constituted a hardship on Petitioner to have subpoenas issued and served on witnesses scattered all over Southern California.

As another alternative, Petitioner would have had to produce specimen signatures and a handwriting expert, the cost of which is prohibitive.

Even such a solution would be unsatisfactory because it does not include the presentation of any evidence of the circumstances under which the cards were obtained.

For example, in this case, the cards of several employees were apparently obtained because they were told they would get increased wages and health insurance if they signed them [R. T. 54-55], an obvious misrepresentation of fact in view of the provincial nature of the people involved. [R. T. 450-455.] The cards should not have been counted. *NLRB v. S. E. Nichols Company*, 2nd Cir., June, 1967, F. 2d

It is small wonder that unions, lawyers, writers, the Board and the Courts have said that authorization cards

are an unreliable means of determining whether or not an employee wishes a union to represent him. *A Guidebook For Union Organizers*, published by Industrial Union Department, AFL-CIO, Sept., 1961 (“NLRB pledge cards are at best a signifying of intention at a given moment. Sometimes they are signed to ‘get the union off my back’”). The Regulation of Campaign Tactics In Representation Elections Under The National Labor Relations Act, 78 *Harvard Law Review* 38. (“But it is widely conceded that authorization cards are an unreliable index of support”). Authorization Cards As An Indefensible Basis For Board Directed Union Representation Status: Fact and Fancy, Commerce Clearing House, *Labor Law Journal*, April, 1967. *Sunbeam Corp.*, 99 NLRB 546. *N.L.R.B. v. Flomatic Corp.*, 2nd Cir., June, 1965, 347 F. 2d 74.

But over and above considerations of fairness, the introduction of any card not authenticated by the person purportedly signing it constitutes hearsay. If it is true the cards are introduced as evidence that those signing them have designated the union as their agent for collective bargaining, they constitute out of court statements introduced to prove the truth of the facts recited therein and are hearsay.

In addition, one of the cards was not authenticated at all, Tana testifying that he did not see Antonio Landeros sign the card. [R. T. 120-121.]

Finally, those cards which Mandapat attempted to authenticate should be rejected as a group. His testimony on the signing of the cards is not worthy of belief, especially when read in conjunction with the affidavits he gave to General Counsel [R. T. 166-257],

and the fact he gave what must be regarded as purposely false affidavits to General Counsel during the investigation of the union charge.

2. Jok Chan.

General Counsel sought to prove the union's majority by showing that Jok Chan was a due-paying member of Local 535 on March 8, 1966. Otherwise, General Counsel had only 26 cards out of a 52-man unit. The fact is that Chan was initiated into Local 226 in Las Vegas, Nevada. He later transferred to Local 535 in connection with a job in El Centro, California. [R. T. 73, 82.]

There is not a shred of evidence that Jok Chan ever intended to designate Local 535 as his agent for collective bargaining in connection with his employment at *Don The Beachcomber in Palm Springs, California*.

3. Leonard Mandapat.

The credibility of Leonard Mandapat is an important issue in this case. His testimony was used to authenticate 13 of 26 authorization cards. It was Mandapat who attributed many of the coercive statements to Aranas.

It is a disgusting turn of events when the Board chooses to credit a witness who has submitted false affidavits to it in connection with General Counsel's investigation of the charge.

A reading of the two affidavits which Mandapat submitted to the Board, when compared with the admissions he made on cross-examination, make it obvious he gave General Counsel completely and purposely false affidavits.

Apparently, General Counsel became aware of this while preparing for hearing and moved to dismiss paragraph 17 of the complaint at the hearing.

Mandapat gave sworn statements to General Counsel to the effect the day after the meeting at Jordan's house his waiter assignments were changed so he made less money. He stated that on March 12, 1966, a Saturday night, he hardly waited on any customers, but people were waiting in line to eat, and he made only \$5.00 in tips that night. He went on to state that he used to average \$150 to \$175 each week in tips, but that after the meeting, his tips decreased by fifty percent.

On cross-examination, Mandapat admitted that on Saturday nights he normally sold between \$250—\$300 worth of food, and that on Saturday, March 12, he sold \$281 worth of food. [R. T. 299.]

It does not seem believable that he then made \$5 in tips on sales totaling \$281.

Petitioner then introduced evidence in the form of company records to show that Mandapat's tips did not decrease by 50% after March 12th. His tips for the first four months of 1966 were:

January	209.50
February	208.00
March	199.00
April	222.00

[Resp. Ex. 4, R. T. 392-393.]

On the night of March 12th, Mandapat was not just standing around and his tips did not decrease thereafter. They increased.

Mandapat was otherwise discredited. His testimony about the signing of the authorization cards is full of

contradictions and conflicts with the affidavits given General Counsel on the points in question.

He certainly did not see Enrique Placencia and Paul Vasquez sign cards. He had written his own name on the back of every card he had obtained, as he had been instructed, but his name does not appear on the back of their cards. [General Counsel's Ex. 3(r) and 3(t).]

4. The Section 8(a)(1) Violations.

The direct or cross examination of each witness testifying about the meeting at Jordan's house makes it clear that everything Aranas said was protected by Section 8(c) of the Act, as amended. [R. T. 133-134, R. T. 264-265, R. T. 265-266, R. T. 269, R. T. 354-355, R. T. 356.] See *N.L.R.B. v. Morris Novelty Co., Inc.*, 8th Cir., June, 1967, F. 2d

Aranas never stated that hours or the rotation system would be changed if the union came into the restaurant. He simply was stating his opinions and arguments that the union might require certain things to be done which, in turn, might require the company to take certain necessary steps. If what Aranas said is illegal, Section 8(c) is meaningless.

There was nothing coercive in Aranas asking Nobello and Jordan (separately) if they had signed cards.

Jordan was his long time friend and brother-in-law.

The statement to Nobello about not being able to work in Hollywood was only a statement that he did not know if a man from a union house could work in a non-union house. When he found out the correct answer, Nobello went to Hollywood.

The testimony of threats to Mandapat by Aranas should be disregarded. Mandapat was a discredited witness.

Aranas did not arrange, suggest or participate in a “poll” of employees. A waiter, Ben Jordan, invited him to a meeting so “the boys” could tell him why they had signed cards.

All of the waiters and bus boys at the meeting knew Aranas was there, including Mandapat, and no one objected to his presence.

Further, Aranas made it clear at the meeting that he was not opposed to the union [R. T. 132-133], and they were free to join if they wished. See *National Can Corp. v. N.L.R.B.*, 7th Cir., March, 1967, 374 F. 2d 796. *N.L.R.B. v. O. A. Fuller Super Markets, Inc.*, 5th Cir., March, 1967, 374 F. 2d 197.

5. Good Faith Doubt and Violation of Section 8(a)(5).

There is no credible evidence Petitioner had a bad faith doubt concerning the union’s claim of a majority and set out to undermine it.

Initially, it should be noted the union filed a petition for an election before Petitioner ever had a chance to respond to its letter of March 8, 1966. Petitioner did not receive the letter until March 9, 1966. On March 15, the petition was filed, four days before the 10 day period set forth in the letter expired.

It should also be noted the March 8th letter failed to unambiguously describe an appropriate unit of employees. See *N.L.R.B. v. Morris Novelty Co., Inc.*, *supra*.

The initial company response indicated it preferred a Board-conducted secret ballot election.

The main objection seems to be that Petitioner preferred to have the election at a date when all of the

employees who would be effected by the outcome of the election would have a chance to vote. The restaurant was planning to close within a few months, as it normally does for the summer and early fall and the closing would be preceded by lay-offs. Normally, there would be a significant number of new employees the following season and Petitioner wanted the election to be held at the start of the new season so these new employees could vote on their future.

The evidence in this case does not support a finding that Petitioner acted in bad faith in refusing to bargain with the union and insisting upon a Board conducted election. *Wasau Steel Corp. v. N.L.R.B.*, 7th Cir., April, 1967, F. 2d *Peoples Service Drug Stores v. N.L.R.B.*, 6th Cir., April, 1967, 375 F. 2d 551. *Hercules Packing Corp.*, 163 N.L.R.B. No. 35.

Conclusion.

General Counsel failed to prove the union represented a majority of the 52 unit employees at the time of its demand for recognition.

There is no substantial evidence Petitioner violated Section 8(a)(1) through Aranas or that it did not have a good faith doubt about the alleged majority status of the union and thus violated Section 8(a)(5).

For the reasons above stated, the cross petition for enforcement should be dismissed and the Board's order set aside.

Respectfully submitted,

SWEENEY, COZY & FOYE,
M. J. DIEDERICH,

*Attorneys for Petitioner,
Don The Beachcomber.*

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

M. J. DIEDERICH

No. 26704

**In the United States Court of Appeals
for the Ninth Circuit**

DON THE BEACHCOMBER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**ON PETITION FOR REVIEW AND ON CROSS-PETITION FOR EN-
FORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELA-
TIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,

General Counsel,

DOMINICK L. MANOLI,

Associate General Counsel,

MARCEL MALLET-PREVOST,

Assistant General Counsel,

ALLISON W. BROWN, JR.,

VIVIAN ASPLUND,

Attorneys,

National Labor Relations Board.

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WM. B. LUCK CLERK

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**In the United States Court of Appeals
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No. 20704

DON THE BEACHCOMBER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*ON PETITION FOR REVIEW AND ON CROSS-PETITION FOR EN-
FORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELA-
TIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of Don the Beachcomber (herein called petitioner or the Company) to review and set aside an order of the National Labor Relations Board (R. 31-32, 46-47) ¹ issued against petitioner on March 3, 1967, following

¹ References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the record. References designated "GCX", and "PX", and "CPX" are to the General Counsel's, petitioner's and the charging parties exhibits, respectively. Whenever in a series of references a semicolon appears, those preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

The Union, on March 11, sent a second letter to the Company again claiming majority status and offering to submit to a card check by a third party (Tr. 379; CPX 1). Receiving no response to either letter, the Union filed a representation petition with the Board on March 15 (Tr. 78-79). During a conversation on that date with a Board agent, Company's counsel, Matthias J. Diederich, was notified that this petition had been filed (Tr. 449-450). On the same day Diederich sent a letter to the Union in which he did not question the Union's majority status but simply stated (R. 26; GCX 5):

It has been our experience and it is our belief that employees frequently sign authorization cards for reasons other than the intent to appoint a union as their bargaining agent, and for this reason, we believe the question of representation should be decided by a secret ballot election.

B. The campaign to defeat the Union

Shortly after President Fine received the Union's letter requesting recognition he asked Service Manager Nash Aranas to "more or less find out if it [was] true" that the Union represented a majority of the Palm Springs employees (R. 26; Tr. 384-385). On March 11, Aranas asked waiter Ben Jordan, his brother-in-law, if he had joined the Union (R. 27; Tr. 302-303, 352-354). Aranas also told Jordan that he understood many employees had authorized the Union to represent them (R. 27; Tr. 303). After Jordan replied that this was true, Aranas asked: "I wonder why you boys have joined the Union, when we used

to be just like one happy family? Why should we have a third man between us?" (R. 27; Tr. 303-304.) Jordan suggested that Aranas ask the employees and offered to hold a meeting at his home that evening for such purpose (R. 27; Tr. 304). Many of the employees in the unit attended this meeting, which began about midnight (R. 27; Tr. 129, 144, 204-205, 304-305, 375).

At the meeting Jordan stated that "the main thing that I ask[ed] you boys to come here for is for Nash [Aranas] to know why you signed the union card" (R. 27; Tr. 309). He asked each of those present to stand up and say why he had joined the Union (R. 27; 131, 262-263, 310). Service Manager Aranas then addressed the group, stating that they were one big happy family and that the employees could come to him to straighten out problems (R. 27; Tr. 308). He told them that he was not opposed to the Union and that, if the employees wanted to join the Union, it was their business, but that they should know the advantages and disadvantages of union membership (R. 27; Tr. 144-145). Aranas asserted that he did not think that union representation would benefit the employees (R. 27; Tr. 356). He warned that the Union might require the employees to work no more than 5 or 6 days a week; that under the existing system which afforded the employees no overtime pay, they could work 7 days and collect more tips; and that, if the Union forced the Company to pay overtime, it might have to cut down on the number of hours and days worked (R. 27; Tr. 133-134, 198, 205, 264-266, 354-355). Aranas also cautioned that the Union might require the Company to change its method of rotating

ployees dated March 31, 1966 (R. 28-29; Tr. 387, PX 3). It read as follows:

A charge has been filed with the National Labor Relations Board alleging that one or more of our supervisors has threatened reprisals against employees who support the Union. We want you to know that we have instructed our supervisors that no employee is to be threatened or discriminated against because he supports the Union.

We assure you that if any such threats of reprisal were made, they were not authorized and were contrary to our instructions. Whether or not you support the Union is your free choice.

We assure you that you are free to support or not support the Union as you wish, without any fear of reprisal or promise of benefits.

II. The Board's conclusions and order

Upon the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by coercively interrogating and polling employees concerning their union activities and by threatening economic reprisals for such activities. The Board further found that the Company violated Section 8(a) (5) and (1) of the Act by refusing to recognize and bargain with the Union because the Company was motivated not by a good faith doubt of the Union's majority status but by a desire to destroy the Union's majority (R. 29-30, 46-46).

The Board's order (R. 31-32, 46-47) requires the Company to cease and desist from the unfair labor

practices found and from in any other manner infringing upon its employees' rights under the Act. Affirmatively, the order requires the Company to bargain with the Union on request and to post appropriate notices.

ARGUMENT

I. Substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act

The evidence summarized above reveals that upon receiving the Union's request for recognition, petitioner embarked on a course of unlawful conduct designed to discourage the employees' support of that organization. Thus, shortly after the Company received the recognition request, Service Manager Aranas participated in the polling of the Palm Springs employees to determine their union sympathies. After the employees affirmed their support of the Union, Aranas threatened that a reduction of hours of work and, therefore, of tips and pay, and that a change in the system of rotating waiters might result from unionization. The coercive impact of Aranas' remarks is vividly demonstrated by employee Jaramillo's reaction that, if he had known the tips were going to be less and the hours of work shorter, he would not have joined the Union (Tr. 207). Aranas also interrogated employees Jordan, Mandapat, and Nobello individually concerning their union activities. Aranas threatened Mandapat that he did not know what he was "going to be missing" by joining the Union and that employees might lose their jobs if the Palm Springs restaurant was unionized (Tr. 184, 280-

281). In addition, Aranas threatened Mandapat and Nobello with loss of employment opportunities at the Company's Hollywood restaurant during the months the Palm Springs operation closes down if the Union became their collective bargaining representative. That such employer conduct interferes with, restrains, and coerces employees within the meaning of the Act is too well settled to require extended discussion. *N.L.R.B. v. U.S. Divers Company*, 308 F. 2d 899, 905 (C.A. 9); *N.L.R.B. v. Security Plating Company, Inc.*, 356 F. 2d 725, 728 (C.A. 9); *N.L.R.B. v. Victory Plating Works, Inc.*, 325 F. 2d 92, 93 (C.A. 9); *Carpenteria Lemon Assn. v. N.L.R.B.*, 240 F. 2d 554, 558 (C.A. 9), cert. denied, 354 U.S. 909; *N.L.R.B. v. Parma Water Lifter Co.*, 211 F. 2d 258, 261-262 (C.A. 9), cert. denied, 348 U.S. 829; *N.L.R.B. v. West Coast Casket Co.*, 205 F. 2d 902, 904 (C.A. 9). Cf. *N.L.R.B. v. California Compress Co.*, 274 F. 2d 104, 106 (C.A. 9).

The Company contends that Aranas' polling and interrogating of employees concerning their union sympathies were not coercive; that his statements at the meeting in Jordan's home and to Norbello concerning work in the Hollywood restaurant were mere predictions or opinion about the future protected by Section 8(c) of the Act. We submit that the "opinions or arguments" that Aranas expressed at the meeting "were more than those authorized by Section 8(c) or the First Amendment to the Constitution. Rather, they constituted [part of] a prohibited anti-union campaign." *N.L.R.B. v. Security Plating Company, Inc.*, 356 F. 2d 725, 728 (C.A. 9). As the Fifth Circuit ob-

served in *N.L.R.B. v. Nabors*, 196 F. 2d 272, 276 (C.A. 5), cert. denied, 344 U.S. 865 (cited with approval by this Court in *N.L.R.B. v. Geigy Company*, 211 F. 2d 553, 557), cert. denied, 348 U.S. 821⁹:

[W]hen statements such as these are made by one who is a part of the company management, and who has the power to change prophecies into realities, such statements whether couched in language of probability or certainty, tend to impede and coerce employees in their right to self-organization, and therefore constitute unfair labor practices.

Section 8(c) of the Act extends to the expression of "views, argument or opinion" *only* when unaccompanied by threats of reprisal or promise of benefits. Plainly, then, Section 8(c) does not protect the statements Aranas made at the meeting, nor his statement to Norbello that, if the Palm Springs restaurant was unionized, Norbello could not work during the summer months in the Hollywood restaurant which was nonunion.

The Company also urges that the Trial Examiner and the Board improperly credited employee Leonard Mandapat who testified not only concerning interrogations and threats made by Aranas but also concerning authorization cards signed in his presence. The Com-

⁹ Accord: *Edward Fields, Inc. v. N.L.R.B.*, 325 F. 2d 754, 760 (C.A. 2); *Hendrix Mfg., Inc. v. N.L.R.B.*, 321 F. 2d 100 (C.A. 5); *N.L.R.B. v. Moore Dry Kiln Co.*, 320 F. 2d 30, 32 (C.A. 5); *N.L.R.B. v. Elias Bros. Big Boy, Inc.*, 327 F. 2d 421, 422-423 (C.A. 6); *Bauer Welding and Metal Fabricators v. N.L.R.B.*, 358 F. 2d 766 (C.A. 8); *Santangelo v. N.L.R.B.*, 364 F. 2d 979 (C.A. 10).

pany contends that certain discrepancies between Mandapat's testimony and statements in his prehearing affidavits and tax returns showing his earnings record require that he be discredited. In light of the Company's contentions, the Board made a "careful review of the record," on the basis of which, it concluded that "the inconsistencies referred to by [the Company] did not warrant impeachment of Mandapat's credibility." It further noted that the Trial Examiner's resolutions of credibility were not "contrary to the clear preponderance of all the evidence" (R. 46, n. 1). The Board cited the testimony of other employees and of Aranas himself which corroborated much of Mandapat's testimony (*ibid.*). In an unfair labor practice case where, as here, the Board has adopted the Trial Examiner's findings crediting certain testimony and discrediting other testimony, it is well settled that their determinations will not ordinarily be disturbed. *N.L.R.B. v. Local 776 I.A.T.S.E.*, 303 F. 2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826; *N.L.R.B. v. Stanislaus Equipment Co.*, 226 F. 2d 377, 381 (C.A. 9); *N.L.R.B. v. Homedale Tractor & Equipment Co.*, 211 F. 2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B. v. Dant*, 207 F. 2d 165, 167 (C.A. 9); *N.L.R.B. v. San Diego Gas & Electric Co.*, 205 F. 2d 471, 475 (C.A. 9). We submit that there are no circumstances present in this case which would warrant a departure from this general rule and that the resolutions of the Trial Examiner, adopted by the Board, are entitled to affirmance.

Against the background of the threats made at the meeting and to employees Mandapat and Nobello, the

polling and interrogating of employees concerning their union sympathies were clearly coercive. Furthermore, the notice petitioner posted after the filing of the unfair labor practice charges herein was not sufficient to counteract or neutralize its unlawful conduct. A repudiation, in order effectively to overcome coercive action must be timely and unambiguous. *Livingston Shirt Corp.*, 107 NLRB 400, 403; *Salant & Salant, Incorporated*, 92 NLRB 417, 444-446 and cases cited therein. Here, the Company's notice was not posted until after the Company's campaign to undermine the Union and its persistent refusal to recognize the Union made necessary the filing of charges with the Board to vindicate the employees' organizational rights. Under such circumstances, the reasonable presumption is that the notice was intended to aid the Company in the subsequent presentation of its defense against those charges. The notice, furthermore, contained no specific repudiation or disavowal of past conduct. It merely referred to the fact that there had been charges filed with the Board which *alleged* that one or more supervisors had threatened reprisals against employees who supported the Union, and further purported to assure employees that *if* "any such threats of reprisal were made, they were not authorized and were contrary to our instructions" (R. 29; PX 3). Declarations couched in general terms do not amount to an adequate repudiation of past coercive conduct. "Even where assurances are made to the employees, the actions of executives may be looked to to determine the policy of the company. Lip service to the policy and purposes of the Act is not sufficient."

N.L.R.B. v. Laister-Kauffmann Aircraft Corp., 144 F. 2d 9, 15 (C.A. 8). We submit that, notwithstanding the Company's general disclaimer, there was, on the evidence in this case, interference, restraint and coercion justifying the Board's finding of violations of Section 8(a)(1) of the Act. *N.L.R.B. v. Austin Powder Company*, 350 F. 2d 973, 975-976 (C.A. 6); *N.L.R.B. v. Armstrong Tire & Rubber Co.*, 228 F. 2d 159, 160-161 (C.A. 5); *N.L.R.B. v. Mylan-Sparta Co.*, 166 F. 2d 485, 490 (C.A. 6); *Magnolia Petroleum Co. v. N.L.R.B.*, 200 F. 2d 148, 150 (C.A. 5).

II. Substantial evidence on the whole record supports the Board's finding that the Company violated Section 8(a) (5) and (1) of the Act by refusing to recognize and bargain with the Union

Section 8(a) (5) of the Act requires an employer "to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." This latter section provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining. * * *" Although Section 9(c)(1) provides machinery by which the question of representative status may be determined in a Board-conducted election, it has long been settled that an election is not the only means by which a union's representative status may be established. See *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72. Thus, there is no absolute right vested in an employer to demand an election. *N.L.R.B.*

v. *Idaho Egg Producers*, 229 F. 2d 821 (C.A. 9); *N.L.R.B. v. Trimfit of California, Inc.*, 211 F. 2d 206, 209 (C.A. 9); *N.L.R.B. v. W. T. Grant Co.*, 199 F. 2d 711 (C.A. 9), cert. denied, 344 U.S. 928. Where a union has obtained authorization cards signed by a majority of the employees in an appropriate unit, designating the union as their bargaining representative, an employer violates Section 8(a)(5) of the Act if, absent a good-faith doubt of the union's majority status he refuses to recognize and bargain with the Union, in order to gain time within which to undermine the union's majority support. *N.L.R.B. v. Security Plating Company*, 356 F. 2d 725, 726-727 (C.A. 9); *Master Transmission Rebuilding Corp. v. N.L.R.B.*, 373 F. 2d 402 (C.A. 9), enforcing 155 NLRB 364, 367-369; *Snow v. N.L.R.B.*, 308 F. 2d 687, 691 (C.A. 9); *N.L.R.B. v. Scott & Scott*, 245 F. 2d 926, 928 (C.A. 9); *N.L.R.B. v. Parma Water Lifter Co.*, 211 F. 2d 258, 263 (C.A. 9), cert. denied, 348 U.S. 829; *N.L.R.B. v. Geigy*, 211 F. 2d 553, 556 (C.A. 9), cert. denied, 348 U.S. 821.

The record here shows that by March 8, the date the Union requested recognition as bargaining agent, it represented 27 of the 52 employees in the unit sought. Moreover, the Union expressed its willingness to demonstrate its majority status to the Company by submitting its cards for review by "an impartial third party" (R. 26; GCX 4). In response, the Company did not question the Union's majority status or the appropriateness of the unit, but merely stated that it would not recognize the union without an election. We submit that the Company's total course of conduct

demonstrates its lack of good-faith doubt of the Union's majority status. For while a good-faith doubt of majority is a proper defense, this is so "only where the doubt has a rationale basis in fact." *N.L.R.B. v. Howe Scale Co.*, 311 F. 2d 502, 504 (C.A. 7). Here, although the Union offered the Company a method of verifying its claim to representative status, the Company chose to disregard the offer, and instead, to engage in conduct designed to suppress the Union. See *Joy Silk Mills v. N.L.R.B.*, 185 F. 2d 732, 741-742 (C.A.D.C.), cert. denied, 341 U.S. 914. In short, the Company's conduct in refusing to honor the Union's request for bargaining and contemporaneous resort to coercive activities in an effort to destroy the Union's majority were patently "inconsistent with the policy and purpose of Section 8(a)(5) of the Act and evidences employer rejection of collective bargaining principles." *Retail Clerks Union, Local 1179 v. N.L.R.B.*, 376 F. 2d 186, 191 (C.A. 9).

The Company alleges that it undertook to determine the facts by polling the employees and that it concluded from statements several employees made that a majority of the employees had not authorized the Union to represent them. Although it is true that, during the unlawful polling, certain employees said that they had signed cards because others were doing so (R. 27; Tr. 148, 208, 270, 310-311), such statements afford no basis for invalidating their cards or for the Company's purported doubt about the Union's ma-

jority status, for such statements do not indicate that the employees' act of signing was not voluntary or uncoerced. Further, the statements were extracted from the employees by their supervisor under circumstances that were hardly the occasion for free expression of choice. Moreover, it is well recognized that "an employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought the card meant, cannot negative the overt action of having signed a card designating a union as bargaining agent." *Joy Silk Mills v. N.L.R.B.*, 185 F. 2d 732, 743 (C.A.D.C.), cert. denied, 341 U.S. 941. Since the authorization cards were clear and unambiguous (GCX 3a-3z), any reservations certain employees might later have expressed cannot serve to invalidate their otherwise valid designations of the Union as their bargaining representative. *N.L.R.B. v. Hyde*, 339 F. 2d 568, 570 (C.A. 9).¹⁰

We submit that the Company's attempt to undermine the Union's support contemporaneous with its refusal to recognize the Union, except after a Board-conducted election, demonstrates its lack of good-faith

¹⁰ Accord: *Jas. H. Matthews & Co. v. N.L.R.B.*, 354 F. 2d 432, 436 (C.A. 8), cert. denied, 384 U.S. 1002; *Colson Corp. v. N.L.R.B.* 347 F. 2d 128, 135 (C.A. 8), cert. denied, 382 U.S. 904; *N.L.R.B. v. Winn-Dixie Stores, Inc.*, 341 F. 2d 750, 755 (C.A. 6), cert. denied, 382 U.S. 830; *Consolidated Machine Tool Corp.*, 67 NLRB 737, 739, enf'd, 163 F. 2d 376, 378 (C.A. 2), cert. denied, 332 U.S. 824; *N.L.R.B. v. Stow Mfg. Co.*, 217 F. 2d 900, 902 (C.A. 2), cert. denied, 348 U.S. 964; *N.L.R.B. v. Greenfield Components Corp.*, 317 F. 2d 85, 89 (C.A. 1).

doubt of the Union's majority status and, therefore, that the Board's finding that the Company violated Section 8(a) (5) and (1) of the Act is entitled to affirmance. See cases cited *supra*, pp. 15-16.

In an effort to overturn the Board's conclusion that it violated Section 8(a)(5) of the Act, the Company seeks to challenge the finding that the Union had a majority, by arguing that the introduction at the hearing of certain authorization cards, which were not identified by their signatories, violated its right to cross-examine the signers and that these cards constituted inadmissible hearsay evidence because they were "out of court statements" made by persons who did not appear as witnesses to prove the truth of their contents (Br. p. 7). This contention has no merit, for it is well established that cards may be authenticated by persons who witnessed the signing of authorization cards and can testify as to the attending circumstances and manner in which the cards were signed. *N.L.R.B. v. Howell Chevrolet Co.*, 204 F. 2d 79, 85-86 (C.A. 9); *N.L.R.B. v. Sunshine Mining Co.*, 110 F. 2d 780, 790 (C.A. 9), cert. denied, 312 U.S. 678; *Colson Corporation v. N.L.R.B.*, 347 F. 2d 128, 134 (C.A. 8), cert. denied, 382 U.S. 904; *N.L.R.B. v. Economy Food Center*, 333 F. 2d 468, 471 (C.A. 7); *N.L.R.B. v. Philamon Laboratories*, 298 F. 2d 176, 179-180 (C.A. 2), cert. denied, 370 U.S. 919. Here, as the Board found (R. 46), the General Counsel properly authenticated the cards through witnesses who testified to observing the signing of the cards or receiving a signed card from the signatory employees. Moreover, it is significant, as the Board noted (*ibid.*) that not

only the employee witnesses but also Service Manager Aranas testified that employees at the Jordan meeting declared that they signed cards and joined the Union (Tr. 358).¹¹

There is likewise no merit in petitioner's contention that, before the hearing, the General Counsel should have furnished its attorney with a list of those employees who had signed cards in order to enable a proper presentation of petitioner's case. Although petitioner requested and was denied (R. 16-23) an order for a bill of particulars prior to the hearing, it was seeking other information at that time and made no request for data on the identity of card signers (R. 16-19). Moreover, at the hearing, the Trial Examiner expressly advised petitioner's counsel that, if he needed time to compare the signatures on the cards

¹¹ Petitioner contends (Br. p. 7) that the card of Antonio

Landeros was never authenticated. Employee Tito Tana testified (Tr. 119-121) that Landeros gave him a card bearing Landeros' name and that he submitted the card to the Union. This Court has held that a card may be authenticated by such testimony. *N.L.R.B. v. Howell Chevrolet Co.*, *supra*, 204 F. 2d at 85-86; *N.L.R.B. v. Howard-Cooper Corp.*, *supra*, 259 F. 2d 558, 560. With respect to the cards authenticated by Union Representative Sue Haning, petitioner states (Br. pp. 4-5) that Haning "had no first-hand knowledge that four of the cards which she attempted to authenticate had been signed by the purported signatories." These cards were signed at a small meeting over which Haning officiated (Tr. 11-12). Tana helped her arrange the meeting and introduced her to each employee as he arrived (Tr. 12, 26). No one other than petitioner's employees attended the meeting (Tr. 158-159). The cards were placed on a table, employees picked them up, signed them in Haning's presence, and returned them to her (Tr. 28-29). Clearly, Haning was qualified to testify concerning the authenticity of all these cards.

with those on the payroll records or “to check out the witnesses,” he would “give it to [him]” (Tr. 126). Of course, counsel could have applied for subpoenas to bring in any person not present at the hearing. No application for a continuance or for subpoenas was made. Under such circumstances, petitioner cannot show prejudice in the presentation of its case. Cf. *N.L.R.B. v. Globe Wireless Ltd.*, 193 F. 2d 748, 751 (C.A. 9).

Petitioner also contends now (Br. p. 8) that Jok Chan never authorized the Union to represent him. This “contention not having been expressly raised before the Board, it * * * should not be considered in this enforcement proceeding.” *N.L.R.B. v. Hyde*, 339 F. 2d 568, 570 (C.A. 9). The “failure to inform the Board at the proper time that [this matter] would be drawn in question * * * precludes the claim here.” *N.L.R.B. v. Sunshine Mining Co.*, 110 F. 2d 780, 790 (C.A. 9), cert. denied, 312 U.S. 678.¹² In any event, the record establishes that Chan was a member of the Union at the time of its request for recognition. True,

¹² Other matters not raised in petitioner’s exceptions to the Trial Examiner’s Decision are 1) the assertion (Br. p. 11) that the letter demanding recognition failed to describe unambiguously an appropriate unit, and 2) the claim (Br. p. 6) that cards were obtained through misrepresentations. Nor did petitioner question the Union’s description of the unit sought or its appropriateness at the time of the refusal to bargain. Further, nothing in the record shows that there were any misrepresentations in obtaining cards, let alone that any such alleged misrepresentations were known to petitioner. The fact that grounds for a doubt might have developed after the refusal to bargain is immaterial. *Retail Clerks Union, Local 1179 v. N.L.R.B.*, *supra*, 376 F. 2d at 191 (C.A. 9); *Snow v. N.L.R.B.*, *supra*, 308 F. 2d at 693–694 (C.A. 9).

he had been initiated into a sister local, but he transferred to the local seeking to represent petitioner's employees, and paid dues to it regularly for several months prior to the recognition demand. Accordingly, the Board properly found that Chan had authorized the Union to represent him. Cf. *American Newspaper Publishers Association v. N.L.R.B.*, 193 F. 2d 782, 804-805 (C.A. 7), cert. denied, 344 U.S. 812; *N.L.R.B. v. Bradford Dyeing Association*, 310 U.S. 318, 339; *N.L.R.B. v. Franks Bros. Co.*, 137 F. 2d 989, 992 (C.A. 1), affirmed, 321 U.S. 702; *N.L.R.B. v. Delaware New Jersey F. Co.*, 128 F. 2d 130, 134 (C.A. 3); *N.L.R.B. v. Chicago Apparatus Co.*, 116 F. 2d 753, 756 (C.A. 7).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

ARNOLD ORDMAN,
General Counsel,
 DOMINICK L. MANOLI,
Associate General Counsel,
 MARCEL MALLET-PREVOST,
Assistant General Counsel,
 ALLISON W. BROWN, Jr.,
 VIVIAN ASPLUND,
Attorneys,
National Labor Relations Board.

SEPTEMBER 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the pro-

visions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

No. 21704

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DON THE BEACHCOMBER,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S REPLY BRIEF.

FILED

OCT 20 1967

SWEENEY, COZY & FOYE,

M. J. DIEDERICH,

639 South Spring Street,
Los Angeles, Calif. 90014,

Attorneys for Don The Beachcomber.

WM. B. LUCK, CLERK



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PETITIONER'S REPLY BRIEF.

In General.

Initially, it is necessary to point out certain inaccuracies and comment upon certain inferences contained in the Board's brief.

Point One:

On page 3 of its brief, the Board inaccurately states and infers that the union informed Fine it "represented a majority of the employees in the Palm Springs restaurant."

This is not true. On March 8, the union representatives called upon Fine shortly before the noon hour without an appointment and without any notice they were coming. As Mrs. Perrigo, its Secretary-Treasurer, stated:

Between Mr. Jones and myself we introduced ourselves to Mr. Fine and told him that we represented a *portion of his people* in Palm Springs and that we would like to have a meeting. [R.T. 64-65.] (Emphasis added.)

It is clear Perrigo at that time did not state the union represented a majority of employees in an appropriate bargaining unit.

Nor does the union's letter of March 8, 1966 [General Counsel's Ex. 4] to Fine inform him that the union represented a majority of the employees in the Palm Springs restaurant.

That letter stated:

An overwhelming majority of your employees have signed Authorization Cards for us to represent them and we will submit to an impartial third party to review and verify our Authorization Cards if you so desire. (Emphasis added.)

That statement, of course, was proven to be false, for not only did the union lack the *overwhelming majority of signed authorization cards*, it lacked even a simple majority.

Thus the Board presents the supreme irony: it accuses Petitioner of acting in bad faith in doubting the union's claim that a majority of its employees had signed authorization cards when, in fact, Petitioner was right, a majority of its employees had not signed authorization cards.

In effect, Petitioner has been found guilty of some sort of illegality because it did not believe a claim which later was proven to be false.

Point Two:

On March 9, Fine received a letter from Perrigo requesting an appointment within ten days, at his convenience, to discuss a union agreement. By letter,

*The previously unavailable citation for *Wasau Steel Corp. v. N.L.R.B.*, cited in Petitioner's Opening Brief, is 377 F. 2d 369.

dated March 11, the union's attorney, for the first time, claimed to represent a majority of employees and requested a meeting as soon as possible. March 12 and 13 were Saturday and Sunday, so March 14 was the first regular business day the letter [Charging Party's Ex. 1] could have been received. Displaying a great deal of impatience at not having received a reply by March 15 to a letter which Petitioner only received on March 14, the union filed a representation petition with the Board on March 15. The filing of the representation petition by the union also occurred four days in advance of the expiration of the ten-day time limit for discussions suggested in its letter of March 8, 1966.

While Petitioner's reply [General Counsel's Ex. 5] to Perrigo's letter used no magic words, it fairly conveyed the company's belief that the union did not represent a majority of its employees and was written after being advised the union had already filed its petition. Yet the Board infers a lack of good faith doubt from the letter, even though written with the knowledge that the union was willing to have an election and had, in fact, petitioned the Board to hold an election.

The Board in its brief quotes only part of the Petitioner's letter, making no reference to those parts which evince Petitioner's good faith:

If a majority of our employees in that (appropriate) unit in the election indicate they desire Local 535 to represent them for purposes of collective bargaining, the employer will be pleased to meet with you to negotiate a collective bargaining agreement.

Point Three:

It is not accurate as the Board states in its brief (p. 4) that Fine asked Service Manager Aranas to find out if the union represented a majority of the Palm Springs employees and that Aranas told Jordan that he understood many employees had signed authorization cards.

The fact is that Fine told Aranas the union claimed an overwhelming majority of the employees had signed cards and to see if it was true. Later, when Aranas talked to Jordan, he simply said, "I heard that you boys have signed for the union." [R.T. 303.] The term "boys" referred only to the dozen or so Filipino waiters and bus boys. Neither Fine nor Aranas said anything to indicate the union was claiming to represent a majority of employees. They were talking about the union's claim that an overwhelming majority of all the employees had signed cards, which was not true.

Point Four:

The meeting was attended only by about a dozen Filipino waiters and bus boys. [R.T. 304.] There were approximately 40 other unit employees who did not attend the meeting. Consequently, a few days later when Aranas spoke to Fine again, he was only reporting what he knew about the dozen or so Filipino waiters or bus boys who attended the meeting. Aranas was never in a position to state that a majority of the 52 unit employees had signed cards because he had only contacted about 12 employees that weekend.

Point Five:

The testimony by Leonard Mandapat that Aranas approached him and said, "So you are one of the union

organizers,” that Mandapat replied, “So what. I think it is right,” and that Aranas then stated, “You boys are crazy. You don’t know what you are doing. You don’t know what you are going to be missing if you join the union,” must be read in context to be properly evaluated. At the hearing, Mandapat did not recall Aranas’ alleged last statement until it was suggested that the prior statements were not coercive.

“Q. (By Mr. Gora) Do you know Nash Aranas? A. Yes, sir.

Q. During March of 1966, did Mr. Aranas and you have a conversation concerning the union?

A. Yes, sir.

Q. Where did this conversation take place?

A. At Don the Beachcomber, sir.

Q. Approximately what date this . . . when did this conversation take place? A. About the 9th or the 10th.

Q. This is the month of March? A. Yes, sir.

Q. Was there anyone else present during this conversation? A. No, sir.

Q. What did Mr. Aranas say, and what did you say? A. Well, Mr. Aranas approached me and says, ‘So you are one of the union organizers.’ In a way of answering him, I just smiled, and I say, ‘Well, I am. I think it is right that we join the union.’

Q. Is that all that you remember being said during that conversation? A. I have to think for a minute, sir.

Q. Certainly. A. Yes, sir, that is about all.

Mr. Diederich: I will move that his answer be stricken as being totally irrelevant to any allegation contained in the complaint. It is not coercive or threatening. It is not a question."

Then after a long discussion between both counsel and the Trial Examiner (covering a page and a half in the transcript) as to whether or not the testimony indicated anything illegal or coercive, Mandapat, without further solicitation, picked up his cue:

"The Witness: Excuse me, your Honor, I recollect some of the conversation now.

Trial Examiner: Do you want to ask him some questions?

Q. (By Mr. Gora) If you recall anything else that was said, at this time please tell us now.

A. Yes. Like I said in a jokingly and smiling way, 'So what. I think it is right.' But, anyway, Mr. Aranas replied by saying, 'You boys are crazy. You don't know what you are going to be missing if you join the union.' He shook his head and walked away."

Another question that has never been answered is this: How is Aranas supposed to have known before the meeting that Mandapat was a union organizer? The above conversation is supposed to have taken place before the meeting, but it was not until the meeting that Mandapat indicated he was a union organizer.

Point Six:

It is not true, as the Board recites on page 7 of its brief, that Aranas told Nobello if the Palm Springs restaurant was unionized, Nobello would not be able to work in the Hollywood restaurant because it was

non-union. Nobello, on cross-examination, testified as follows:

“Q. Now, when Mr. Aranas asked you if you had signed a slip of paper—a white piece of paper—and you told him that you had, isn’t it a fact that he then said that he didn’t know if he could take you to Hollywood, because there was no union in Hollywood, and if a union came into Palm Springs there might be a conflict, and he wasn’t sure if he could take you? Isn’t that what he said? A. Yes, sir.

Q. He didn’t come right out and say that if you sign a union card you are not going to go to Hollywood, did he? A. Beg your pardon?

Q. He didn’t come out and say that if you sign a union card you are not going to go to Hollywood, did he? A. No.

Q. As a matter of fact, you did go to Hollywood, didn’t you? A. Yes, sir.” [R.T. 106.]

It is also noteworthy that at the meeting, which took place immediately after the above conversation, Aranas told everyone assembled “they were free to join the union if they wanted to,” that “it wouldn’t make any difference to the company,” that “it was up to them if they wanted the union they could join the union.” [R.T. 108.]

Aranas was not threatening Nobello, he simply was confessing ignorance. When he found out that it was possible for an employee from a union restaurant to work in a non-union restaurant, Nobello went to Hollywood.

Point Seven:

The Board claims the company's notice of March 31, 1966, Petitioner's Exhibit 3, was not timely and unambiguous.

It would have been more timely and specific had the Charging Party responded to Petitioner's March 15 letter to its attorney.

On March 11, the union's attorney wrote to Petitioner, alleging:

It has been brought to our attention by said union that some of your supervisory personnel have recently made statements to some of your employees which contained inferences of reprisals against them if they continue to support the union.
[Charging Party Ex. 1.]

Petitioner's attorney promptly replied on March 15, as follows:

Our inquiries reveal no evidence of any unlawful action on the part of supervisory personnel of Don the Beachcomber. If you will be kind enough to advise us specifically what was allegedly said, by and to whom, and when, we shall be pleased to investigate the matter further. If such an investigation reveals violations, we certainly would recommend corrective measures for our client has no desire or intent to violate the law. Charging Party's Exhibit 2.

This letter was never answered by Charging Party, thus, Petitioner's willingness to be timely and specific was thwarted by the union's neglect.

The notice was posted on March 31, two days after the union filed its charge on March 29. It was as specific and timely as the union permitted it to be.

Point Eight:

In its argument and citation of cases, the Board intimates the union had “obtained authorization cards signed by a majority of the employees in an appropriate unit.”

In this case, the union never did obtain authorization cards signed by a majority of the employees in an appropriate unit, even though it falsely claimed that an “overwhelming” majority of such employees had signed cards.

Point Nine:

Petitioner, in its Exceptions to the Trial Examiner’s Decision, excepted to the finding that the union represented 27 of its employees. Exception No. 3. Since General Counsel’s proof of majority status consisted of 26 authorization cards and testimony that Jok Chan was a member of the union, the issue of whether he authorized the union to represent him was raised by Petitioner before the Board.

Coercion and Threats.

Second, a reply to the Board’s argument concerning coercion and threats is necessary.

Frederico Nobello: The Board places great reliance upon Aranas’ conversation with Nobello. First, the conversation was strictly between Aranas and Nobello. It had no effect upon the remaining 51 other unit employees. Second, on cross-examination, Nobello testified that Aranas did not threaten not take him to

Hollywood because of his union support, he only stated there was some doubt in his mind as to whether or not he could do it.

Ben Jordan: Aranas and Jordan were brothers-in-law and friends for many years. Aranas' simple, private inquiry about signing a card was non-coercive. See *NLRB v. McCormick Steel Company*, Fifth Circuit, July, 1967, F. 2d

Leonard Mandapat: Mandapat did not even recall he was ever threatened by Aranas until he got his cue from a discussion between both counsel and the Trial Examiner. In addition, his credibility, to be discussed below, was nil.

The Meeting: The Board in its brief (p. 13), attributing "lip service" to Petitioner, says "lip service to the policy and purposes of the Act is not sufficient." With that principle Petitioner heartily agrees, but does the Board? In announcing the rule requiring employers to supply the names and addresses of their employees for the use of unions in Board conducted elections, the Board said:

"The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly (are) matters which Congress entrusted to the Board alone." In discharging that trust, we regard it as the Board's function to conduct elections in which the employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to im-

pede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed. *Excelsior Underwear, Inc.*, 156 N.L.R.B. No. 11.

Are not employees who sign authorization cards without ever hearing the employer's views on unionization prevented and impeded from making a free and reasoned choice? And is not this more so when they are simple, gullible people and they sign the cards because they are told they will get a wage increase and health insurance if they do? [R.T. 54-55.] Could these employees not make a more fully informed and reasoned choice in an election after some of the potential disadvantages of unionization in the employer's view are pointed out to them?

Not one witness who testified about the meeting stated that Aranas threatened force or reprisals for union support. This was a clanish meeting among Filipino waiters and bus boys, "the boys." It was in the home of a waiter. Aranas was a long-time friend of many of "the boys" attending the meeting. He prefaced his remarks with an assurance the company would take no reprisals for union support, but suggested they consider the disadvantages as well as the advantages of unionization. Every comment he made was in the form of view, opinion, prediction or argument. These employees had a right to know that the

union might demand overtime and abandonment of the rotation system, two matters, which if acceded to by Petitioner, would be of vital interest to them.

If what Nash Aranas said at that meeting was illegal, then, in spite of the First Amendment to the United States Constitution and Section 8(c) of the Act, free speech for an employer in a union representation situation is non-existent.

The Board's decision in this case cannot be reconciled with its pious pronouncements on an employee's right to make a fully informed and reasoned choice.

See *N.L.R.B. v. River Togs, Inc.*, Second Circuit, July, 1967, F. 2d, where the Court said:

“Although the Board apparently thinks workers should be shielded from such disconcerting information, an employer is free to tell his employees what he reasonably believes will be the likely economic consequences of unionization that are outside his control, as distinguished from threats of economic reprisal to be taken solely on his own volition. Cf. Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 77-82 (1964). If § 8(c), does not permit an employer to counter promises of pie in the sky with reasonable warnings that the pie may be a mirage it would indeed keep Congress' word of promise to the ear but break it to the hope.”

See, also, *Southwire Co. v. N.L.R.B.*, Fifth Circuit, August, 1967. F. 2d, where the Court stated:

“The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes

to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available. It is an adversary proceeding and hardly impartial but there is a limit. We conclude that Congress set the limit in § 8(c) and there is no contention that the limit contravenes the First Amendment. Whatever amounts to a threat of reprisal or force or a promise of benefits is beyond the pale. This is the congressional definition of coercion as used in *Thomas v. Collins*, *supra*.

“The law has developed in this area to distinguish between a threat of action which the employer can impose or control and a prediction as to an event over which the employer has no control. The threat is not privileged but the prediction is.”

Leonard Mandapat.

Third, a comment concerning the credibility of Mandapat must be made. Mandapat was General Counsel's whole case. He attempted to authenticate cards and testified threats and coercive statements were made by Aranas.

This Court need not blindly adopt the credibility resolutions of the Board when they are directly contrary to the evidence. Time after time, Mandapat changed his testimony or gave testimony which conflicted with prior testimony or sworn statements he had given to the General Counsel in connection with the investigation of the case. Cross-examining Mandapat was like chasing the elusive butterfly. Finally, he was uncovered in an outright lie, a lie which had led to the inclusion of paragraph 17 in the complaint.

Conclusion.

The question is whether Petitioner acted in bad faith in expressing its preference for the Board conducted election for which the union had petitioned, for, in reality, the union had already petitioned for an election before any refusal to recognize it.

Its good faith was shown by its efforts to correct any alleged illegal conduct on the part of its supervisory personnel and to dispel the effects of any such conduct. Of course, its efforts were rebuffed by the union, even though the union did acknowledge Petitioner's good faith:

We are certain that you do not intend to violate the Federal law and that you will cooperate with us in eliminating ill-advised comments by your supervisory personnel." [Charging Party's Ex. 1.]

The isolated conversations between Aranas and Nobello, and Aranas and his brother-in-law, Jordan, are no basis for a finding of illegal interrogation.

Finally, the comments of Aranas at the meeting were noncoercive and protected.

In order to do justice to the 26 unit employees who did not sign authorization cards, as well as those who signed in ignorance, the Board's order should be set aside.

Respectfully submitted,

SWEENEY, COZY & FOYE,

By M. J. DIEDERICH,

Attorneys for Petitioner.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

M. J. DIEDERICH

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

ARDELL LEE, ET AL.,

Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

CARL EARDLEY,
Acting Assistant Attorney General,

WILLIAM M. BYRNE, JR.,
United States Attorney,

FILED

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WM. B. LUCK, CLERK

MORTON HOLLANDER,
LEONARD SCHAITMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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This action under the Federal Tort Claims Act is barred by the rule of Feres v. United States, 340 U.S. 135, 146, that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21706

UNITED STATES OF AMERICA,

Appellant,

v.

ARDELL LEE, ET AL.,

Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

JURISDICTIONAL STATEMENT

This action was brought against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 et seq., in the United States District Court for the Central District of California (R. 2-5).

On December 15, 1966, the district court denied the Government's motion to dismiss for lack of jurisdiction of the subject matter of the action and failure to state a claim upon which relief can be granted (R. 6-7, 42-50). ^{1/} On February 15, 1967, the district court denied the Government's timely motion for reconsideration but certified that its denial of the motion for reconsideration "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation" (R. 77-79). On March 23, 1967, this Court, pursuant to 28 U.S.C. 1292(b) and this Court's Rule 38, granted the Government's application for leave to take an interlocutory appeal (R. 102). Notice of appeal was filed on March 28, 1967 (R. 81).

STATEMENT OF THE CASE

This action was brought under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 et seq., by the personal representatives of two members of the Marine Corps who, while on active military duty and under military orders, were killed in the crash of an Air Force plane which was transporting them from El Toro Marine Corps Air Station, California, to Viet Nam (R. 2-5, 42). The complaint alleged that, although the United States Air Force operated the aircraft, the accident was caused by the negligence

^{1/} The district court's memorandum of decision and order is reported at 261 F. Supp. 252.

of employees of the Federal Aviation Agency (hereinafter "FAA") in operating, maintaining and controlling the departure of the aircraft from the ground, and in giving inadequate terrain clearance information (R. 2-4).

The Government moved to dismiss the complaint on the ground that Feres v. United States, 340 U.S. 135, barred any Tort Claims Act suit to recover for servicemen's injuries incurred, as those at issue concededly were, "incident to service" (R. 6-7, 10-13). The district court denied this motion, rejecting as "no longer authoritative" (261 F. Supp. at 253-254), the Supreme Court's holding in Feres (340 U.S. at 146) that the Government is not liable under the Act for service-incident injuries to servicemen. The district court went on to hold that in its view servicemen's claims should be excluded from the Tort Claims Act only if "the injuries stemmed from activities that involved an official military relationship between the negligent person and the claimant" (261 F. Supp. at 256). Applying that test, the district court concluded that the instant claims are actionable under the Tort Claims Act since, so far as the FAA was concerned, the decedents "simply were two passengers in an airplane * * *" (261 F. Supp. at 257).

SPECIFICATION OF ERROR

The district court erred in holding that this Federal Tort Claims Act suit is not barred by the rule of Feres v. United States, 340 U.S. 135, 146, that "the Government is not liable

under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."

STATUTE INVOLVED

The Federal Tort Claims Act provides in pertinent part:

28 U.S.C. 1346(b):

Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

ARGUMENT

THIS ACTION UNDER THE FEDERAL TORT CLAIMS ACT IS BARRED BY THE RULE OF FERES V. UNITED STATES, 340 U.S. 135, 146, THAT "THE GOVERNMENT IS NOT LIABLE UNDER THE FEDERAL TORT CLAIMS ACT FOR INJURIES TO SERVICEMEN WHERE THE INJURIES ARISE OUT OF OR ARE IN THE COURSE OF ACTIVITY INCIDENT TO SERVICE."

In Feres v. United States, supra, the Supreme Court held (340 U.S. at 146):

that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.

There is no question but that, under this holding, the district court should have granted the Government's motion to dismiss, for it is undisputed that the servicemen involved were killed "in the course of activity incident to service." The district court recognized that Feres requires the dismissal of this suit, but declined to follow the holding in Feres, considering it "no longer authoritative" (261 F. Supp. at 253-254) insofar as it pertains to negligence assertedly committed by civilian employees of the United States.

The district court justified its decision by isolating various elements of the Supreme Court's opinion in Feres and suggesting that each of these has been enervated by subsequent decisions in other areas. Fastening upon dictum in United States v. Brown, 348 U.S. 110, the district court concluded (261 F. Supp. at 256) that a serviceman's right to sue his Government in tort "would not depend upon whether * * * [he

was] on active duty or on leave at the time of * * * [his] injuries," the line drawn in Feres. Instead, the district court ruled, the right to sue under the Tort Claims Act depends (ibid):

upon whether or not the injuries stemmed from activities that involved an official military relationship between the negligent person and the claimant. If so, the claimant would be precluded; otherwise, he would not. [Emphasis supplied.]

Thus, the district court substituted the status (civilian or military) of the alleged tortfeasor for the rule (status of the serviceman at the time of injury) adopted by the Supreme Court in Feres.

Even apart from consideration of whether such a piecemeal analysis ever may justify a lower court's deviation from a Supreme Court holding, the district court's decision in this case plainly was unwarranted, for the Supreme Court and the courts of appeals have consistently adhered to the Feres exclusion of all service-incident injuries, and Congress has acquiesced in that construction of the Tort Claims Act. This Court, in adhering to the Feres rule, has considered and expressly rejected the rationale underlying the district court's ruling. Callaway v. Garber, 289 F. 2d 171, certiorari denied, 368 U.S. 874. The Third Circuit has recently rejected the district court's reasoning in an action which was brought by representatives of other marines who died in the same crash as did the decedents here. Sheppard v. United States, 369 F. 2d 272, certiorari denied, 386 U.S. 982. And the test

which the district court substituted for that of Feres has also been considered and rejected by the Seventh Circuit. Layne v. United States, 295 F. 2d 433, certiorari denied, 368 U.S. 990.

A. The Feres decision involved three suits brought against the United States under the Tort Claims Act to recover for injuries sustained by servicemen in the United States armed forces as an incident to their military service. The Supreme Court, after a thorough analysis of the background and objectives of the Tort Claims Act, concluded (340 U.S. at 146):

that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.

The Court thus emphasized that the relationship existing between the United States and its military personnel is one "distinctively federal in character," and that the application of local law to that relationship, by virtue of the Tort Claims Act, would be completely inappropriate. 340 U.S. at 143-144. Mr. Justice Jackson's opinion also stressed that the Act "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole" (340 U.S. at 139), and that it was thus highly relevant

that Congress had already provided "systems of simple, certain, and uniform compensation for injuries or death of those in armed services." 340 U.S. at 144. ^{2/}

Since Feres, the Supreme Court has decided only one case involving the question of a serviceman's right to sue under the Tort Claims Act. That case, United States v. Brown, 348 U.S. 110, was brought by a discharged veteran who had been the victim of medical malpractice after his release from service. Holding that the suit was not controlled by Feres, since the injury had not been incurred "incident to service," the Supreme Court expressly said (348 U.S. at 113):

We adhere * * * to the line drawn in the Feres case between injuries that did and injuries that did not arise out of or in the course of military duty.

2/ The concept of "service-incident" injury upon which the Feres decision relied was not a wholly novel one formulated by the Court for the purposes of that decision, but was, instead, one which found a ready context within the framework of workmen's compensation statutes. The Court's likening of military benefits to workmen's compensation benefits and its statement that "most states have abolished the common-law action for damages between employer and employee and superseded it with workmen's compensation statutes which provide, in most instances, the sole basis of liability" (340 U.S. at 143-146), make it clear that the Court contemplated definition of the phrase "incident to service" in terms of the workmen's compensation concept of "course of employment." See, also, United States v. Forfari, 268 F. 2d 29, 33-34 (C.A. 9), certiorari denied, 361 U.S. 902. Of course, the "course of employment" concept of workmen's compensation is not limited to injuries inflicted by fellow employees or otherwise dependent upon the status of the tortfeasor. See, e.g., O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 506-507; Larson, Workmen's Compensation Law, §§ 9.40-9.50, 11.32(b) (1966). Thus, it is clear that the status-of-the-tortfeasor test employed by the district court is fundamentally at odds with the Feres ruling.

In the face of the Supreme Court's explicit "adherence" to the line drawn in Feres, the district court concluded that Brown and Feres were inconsistent, and derived from Brown a substitute for the Feres rule. The district court's thesis was that the veteran in Brown, like the servicemen in Feres, was eligible for compensation; therefore, the court reasoned, the availability of compensation did not, as Feres held it did, indicate that Congress had not intended to provide servicemen with a supplemental Tort Claims Act remedy (261 F. Supp. at 255).

Where the district court went astray, we think, was in misinterpreting what the Supreme Court said in Brown. By Brooks v. United States, 337 U.S. 49, and Feres, the Supreme Court had drawn the line between injuries that were, and those that were not, incurred "incident to service." In Brown, the Court expressly adhered to that line. The servicemen in Brooks and Brown, like those in Feres, were eligible for compensation; but the servicemen whose injuries had not been incurred "incident to service" were permitted to sue under the Tort Claims Act because their suits would not present the peculiar problems raised by suits based upon injuries that were incurred incident to service. The Court explained this distinction in Brown (348 U.S. at 112):

The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court [in Feres] to read that Act as excluding claims

That is not, as appellees would have it, an alteration of Feres; it is, rather, simply an explanation of Brooks and Brown; it gives the reasons why servicemen injured outside the "course of military duty" are exempt from the general rule that where compensation has been provided, tort suits may not be maintained. Although the rule of non-liability to servicemen injured "incident to service" is designed to avoid interference with military discipline, the Supreme Court has never indicated that Feres should be limited to situations which pose a direct threat of interference with military discipline. ^{3/}

3/ Moreover, even if the language of Brown constituted a limitation of the Feres rule (which it does not), this Tort Claims Act suit would not be maintainable. When appellees' decedents boarded the military airplane, they did so under the compulsion of military orders, and were at all times subject to the discipline of the military personnel in charge of the airplane, as well as to the commands of their superiors aboard the craft. Thus, the considerations of discipline which in part underlie the rule of Feres are strikingly present here. Despite the fact that the allegedly negligent persons were not members of the armed service, they were engaged in the performance of a service for the military -- participating in the take-off of an Air Force plane from a military base. Thus, even in the district court's terms, the deaths here in issue "stemmed from activities that involved an official military relationship between the negligent person and the claimant." It is also clear that appellees' allegations would require an inquiry into military affairs if this suit was allowed and that the mere possibility of such a suit and inquiry poses a threat to military discipline.

In Feres, itself, the threat to military discipline was far less direct than it is here. The three cases decided in Feres involved a sleeping soldier who died due to alleged negligence in maintaining a defective heating plant and failing to maintain an adequate fire watch, and two soldiers injured by alleged medical malpractice. The necessity of maintaining discipline while soldiers are sleeping, or on operating tables, is far less clear than the necessity of maintaining discipline among soldiers being transported for military purposes in military aircraft under the control of military authorities.

The viability of Feres is confirmed by the Supreme Court's consistent application of its rationale in analogous situations, holding that where Congress has provided a form of administrative compensation for Government employees injured in the performance of their duties, the availability of such a remedy precludes recourse to a tort suit against the Government.

Johansen v. United States, 343 U.S. 427; Patterson v. United States, 359 U.S. 495. Only this past Term, the Court reviewed and reaffirmed those decisions, holding that federal prisoners who are eligible for compensation are thereby precluded from suing under the Tort Claims Act. United States v. Demko, 385 U.S. 149, 151 (footnote omitted):

Historically, workmen's compensation statutes were the offspring of a desire to give injured workers a quicker and more certain recovery than can be obtained from tort suits based on negligence and subject to common-law defenses to such suits. Thus compensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions. * * * Such rulings of this Court have established as a general rule the exclusivity of remedy under such compensation laws.

Demko illuminates the inapplicability of the decision upon which the district court here also relied, United States v. Muniz, 374 U.S. 150, ^{4/} where "neither of the two prisoners * * * was covered by the prison compensation law." 385 U.S. at 153. Indeed, in Muniz, the Court expressly noted that it found "no occasion to question" the holding in Feres. 374 U.S. at 159.

In short, the Supreme Court never has deviated from the rule of Feres: that the right to maintain a Tort Claims Act suit based on injuries incurred by a serviceman depends upon whether the injuries were incurred "incident to service."

In Brown, as in Feres and Brooks, the determinative factor was the status of the victim.^{5/} Only if the serviceman's injuries were incurred outside the "course of military duty" can his military status be considered so tenuous that he is brought within the compass of the Tort Claims Act.

B. The Supreme Court's satisfaction with the rule laid down in Feres has been echoed in Congress. In Feres, the Supreme Court emphasized that "if we misinterpret the Act, * * * Congress possesses a ready remedy." 340 U.S. at 138. But Congress has acquiesced in the holding of Feres, permitting the decision to stand undisturbed for more than fifteen years. This fact points up the impropriety of the district court's alteration of Feres; given such congressional concurrence, even the Supreme Court would hesitate to overturn its decision:

When the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy

5/ In Brooks, the Court considered irrelevant the fact that the Brooks' injury had been caused by the negligence of a civilian employee of the Army. Founding its decision on the servicemen's status, the Court said: "Were the accident incident to the Brooks' service, a wholly different case would be presented." 337 U.S. at 52. Similarly, Feres and Brown turned exclusively on the status of the injured servicemen; the status of the alleged tortfeasors was irrelevant.

at any time, and in these circumstances reversal is not readily to be made [United States v. South Buffalo R. Co., 333 U.S. 771, 774-775; 6/Patterson v. United States, 359 U.S. 495, 496].

C. The courts of appeals, like the Supreme Court, have adhered "to the line drawn in the Feres case." As, indeed, the district court recognized (261 F. Supp. at 256-257), this Court previously has considered and expressly rejected the reasoning which underlies the district court's ruling. In Callaway v. Garber, 289 F. 2d 171, certiorari denied, 368 U.S. 874, an Air Force officer en route to a training school by private automobile was killed as a result of a collision on a public highway with a vehicle negligently driven by a Navy officer. Since the death was incurred in the course of activities "incident to service," the case fell squarely within the holding of Feres, but did not seem to fit the explanation offered in Brown. This Court decided the case in accordance with Feres, holding that the Tort Claims Act suit could not be maintained (289 F. 2d at 173-174):

The instant case can find no shelter within those reasons [in Brown], since the negligent and injured parties here were members of different branches of the service and were engaged in entirely different

6/ See, also, Preferred Ins. Co. v. United States, 222 F. 2d 942, certiorari denied, 350 U.S. 837, where this Court, speaking of the Feres case, stated (id., at 945):

The decision was unanimous and in the more than four years since it was rendered Congress has not amended the Tort Claims Act. Accordingly, the opinion must be accepted as dispelling any doubt as to congressional intent in the adoption of the Act.

and unconnected activities at the time of the accident. However, the instant case does fall within the rule of the Feres case as promulgated, and we must adhere to said rule since it was in no way negated or modified by the later Brown case. 7/

The district court's ruling is also directly contrary to the Seventh Circuit's decision in Layne v. United States, 295 F. 2d 433, certiorari denied, 368 U.S. 990, a case strikingly similar to this suit. There, the widow of an Air National Guardsman sought Tort Claims Act recovery for his death on a training flight, which allegedly had been caused by the negligence of civilian employees of the United States -- the control tower operators. Plaintiff specifically contended that her suit was not barred by Feres because the alleged negligence was that of civilian control tower operators rather than of other military personnel. 8/ The court, however, found this and other arguments of the plaintiff to be "lacking in merit," and dismissed the suit on the ground that the death occurred "as an incident to military service" (295 F. 2d at 436).

7/ The district court refused to follow this Court's decision in Callaway v. Garber, supra, holding that "the negation of the Feres rule * * * has been provided by the later Muniz decision" (261 F. Supp. at 256-257). However, as shown above (supra, p. 11) the district court's reliance upon Muniz was plainly misplaced.

We note that a decision of this Court rendered subsequent to Muniz is in accord with Callaway v. Garber, supra. In United Air Lines, Inc. v. Wiener, 335 F. 2d 379, 396-398, 402, 404, petition for a writ of certiorari dismissed, 379 U.S. 951, this Court held that the Government was not liable under the Federal Tort Claims Act for injuries to servicemen which arose out of activities "incident to service," even though the Government's liability was predicated, in part, upon negligence of employees of the Civil Aeronautics Administration (the predecessor of the FAA).

8/ Brief of Plaintiff-Appellant, pp. 5, 11, 32-34, 37; Reply Brief of Plaintiff-Appellant, pp. 2-3, 6-9.

We also draw the Court's attention to the recent decision of the Third Circuit in Sheppard v. United States, 369 F. 2d 272, certiorari denied, 386 U.S. 982. That suit was brought by representatives of marines killed in the same crash as were the decedents of appellees here. The complaint in Sheppard alleged that the crash had been caused by the negligence "of defendant's agents, servants, and employees, to wit, members of the United States Air Force and others * * *." (Emphasis supplied.) ^{9/} Much in the vein of the appellees here, the plaintiffs in Sheppard argued that, although Feres had not been specifically overruled, subsequent Supreme Court cases had "destroyed the validity of that case," and that, in any event, Feres should be limited to situations that "pose a threat to military discipline." ^{10/} Rejecting both contentions, the court of appeals ruled (id., at 272):

We hold that the ruling of the District Court was right and proper. Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L. Ed. 152 (1950). The bald statement is made on behalf of appellants in their brief that "* * * subsequent decisions of the Supreme Court destroyed the validity of that case." Nothing could be further from the true fact. Appellants argue from decisions having no real bearing on the tight, clear problem presented. In the only other case since Feres involving the right of a service man to sue the United States in tort, United States v. Brown, 348 U.S. 110, 113, 75 S.Ct. 141, 144, 99 L.Ed. 139 (1954), Mr. Justice Douglas for the Court states "We adhere also to the line drawn in the Feres case between injuries that did and injuries that did not arise out of or in the course of military duty."

9/ ¶4 of the complaint, reproduced at page 2a of appellants' appendix in Sheppard.

10/ Brief of Appellants, pp. 1, 8-21, 21-31.

It is apparent from the cases just cited, and other decisions, ^{11/} that the courts of appeals have consistently applied the Feres rule in all cases involving injuries incurred "incident to service," regardless of the lack of an

11/ E.g., in Preferred Ins. Co. v. United States, supra, 222 F. 2d 942, a Tort Claims Act suit to recover for property damage sustained when an Air Force plane crashed into the trailers of enlisted men and officers located on the base, this Court held that, although "[t]he owners of the damaged trailers had no duties whatever with respect to the maintenance, servicing, loading, operation, dispatch or control of the plane which crashed," the Feres rule barred the suit since "the damage to the trailers of the servicemen arose out of and was in the course of activity incident to their military service" (id., at 943, 948). In Chambers v. United States, 357 F. 2d 224 (C.A. 8), the court ruled that Feres barred a Tort Claims Act suit to recover for the death of an airman killed while swimming at a pool on an Air Force base as the result of alleged negligence in the maintenance of the pool. The court held that it was irrelevant that the decedent "might have had a furlough order in his pocket or might have been engaged in swimming for recreation" (id., at 229). In Zoula v. United States, 217 F. 2d 81 (C.A. 5), the court held that Feres barred a Tort Claims Act suit to recover for injuries suffered by military students who, while touring an Army base, were struck by an army ambulance, and that it was irrelevant that they were not "injured as a result of, or while acting under, immediate and direct military orders" (id., at 84). See, also, United States v. Carroll, 369 F. 2d 618 (C.A. 8), where the court stated that "in every case subsequent to Feres, involving the Government's liability to servicemen under the Federal Tort Claims Act, supra, the determinative issue has been whether the injuries "arise out of or are in the course of activity incident to service" (id., at 620).

See, also, Archer v. United States, 217 F. 2d 548, certiorari denied, 348 U.S. 953, where this Court held that "a cadet riding under military discipline on an army plane under control of a superior officer" has no claim under the Tort Claims Act "for injury sustained through whatever cause" (id., at 551). "This principle," the Court stated, "would not vary even though the service man were on leave and whether he were on the plane voluntarily or by command. He was in line of duty. * * * The allegations set out [in the complaint] would indicate the usual transportation of a soldier in military service in line of duty. The Tort Claims Act does not cover such a situation" (ibid.).
(Continued on next page)

"official military relationship" between the claimant and the alleged tortfeasor, or of an immediate threat to military discipline. Thus, the district court's order stands alone in conflict with the views of the Supreme Court, Congress, and this as well as other courts of appeals.

CONCLUSION

For the reasons stated, the district court's order should be reversed and judgment entered in favor of the appellant dismissing the complaint.

Respectfully submitted,

CARL EARDLEY,
Acting Assistant Attorney General,

WILLIAM M. BYRNE, JR.,
United States Attorney,

MORTON HOLLANDER,
LEONARD SCHAITMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

SEPTEMBER 1967.

(Continued from preceding page)

Cf. Van Sickel v. United States, 285 F. 2d 87, where this Court rejected the contention that a serviceman's representatives were not barred by the Feres rule because the state wrongful death statute gave them a right of action independent of that existing in the serviceman before death. The Court ruled that if Feres was to "be restricted so as to permit recovery in cases of the type of the instant case, such restriction should be made by the Supreme Court and not by this Court" (id., at 91).

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief for the appellant is in full compliance with those rules.

Leonard Schaitman
LEONARD SCHAITMAN
Attorney for Appellant,
Department of Justice,
Washington, D. C. 20530.

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA }
CITY OF WASHINGTON } ss.

LEONARD SCHAITMAN, being duly sworn, deposes and says:

That on September 20, 1967, he caused three copies of the foregoing Brief for the Appellant to be served by air mail, postage prepaid, upon counsel for appellees:

Samuel M. Hecsh, Esquire
110 West "C" Street
San Diego, California 92101

Messrs. Kreindler and Kreindler
99 Park Avenue
New York, New York 10016

Leonard Schaitman
LEONARD SCHAITMAN
Attorney for Appellant,
Department of Justice,
Washington, D. C. 20530.

Subscribed and Sworn to before me
this 20th day of September, 1967.
[Seal]

United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

ARDELL LEE, individually, as Administratrix of the Estate of JAMES E. LEE, deceased, and as the Mother, Next Friend, Natural Guardian and Representative of REGINALD A. LEE, RONALD H. LEE and ARDELL LEE, infants; and BETTY MOORE, individually, as Administratrix of the Estate of RALPH E. WHITE, deceased, and as Mother, Next Friend, Natural Guardian and Representative of RALPH M. WHITE and JON E. WHITE, infants,

Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

**BRIEF FOR APPELLEES WITH APPENDIX
AND SUPPLEMENT**

SAMUEL M. HECSEH,
Attorney for Appellees,
110 West C Street,
San Diego, California 92101.

714-234-3441

Of Counsel:

KREINDLER & KREINDLER,
by Lee S. Kreindler,
Milton G. Sincoff,
George E. Farrell,
99 Park Avenue,
New York, New York 10016.

212-687-8181

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United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

ARDELL LEE, individually, as Administratrix of the Estate of JAMES E. LEE, deceased, and as the Mother, Next Friend, Natural Guardian and Representative of REGINALD A. LEE, RONALD H. LEE and ARDELL LEE, infants; and BETTY MOORE, individually, as Administratrix of the Estate of RALPH E. WHITE, deceased, and as Mother, Next Friend, Natural Guardian and Representative of RALPH M. WHITE and JON E. WHITE, infants,

Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

Jurisdictional Statement

Appellees respectfully refer to and adopt the jurisdictional statement presented by appellant's brief, pages 1-2.

Statement of the Case¹

This action was brought under the Federal Tort Claims Act, 28 U.S.C. § 1346 *et seq.*, to recover wrongful death

¹ Appellant's statement of the case erroneously asserts appellees conceded the subject deaths were incident to service, inaccurately characterizes the opinion of the district court and omits pertinent matters (Brief, pp. 2-3). In accordance with Rule 18, subdivision 3 of the Rules of this Court, appellees present their statement to controvert that of appellant.

damages for the benefit of the widows and children of Marine Corps Sergeant James E. Lee and Corporal Ralph E. White (A1-A4).²

On June 25, 1965, an aircraft operated by the Air Force Military Air Transport Service crashed shortly after take-off near Santa Ana, California and killed appellees' decedents who were aboard as passengers (A1-A4).

This crash was caused by the negligence of the "Federal Aviation Agency, a division of the Government separate and apart from either the United States Marine Corps in which the decedent was serving, or from the United States Air Force that was operating the aircraft" (A2-A3). The F.A.A.'s civilian employees negligently instructed the plane to follow a departure procedure that prescribed inadequate clearance over the terrain near the airport (A2-A3). No claim or suggestion has ever been made by appellees of negligence by the Marine Corps, the Air Force, any military service or the Department of Defense (A1-A4, R24-31, R71-76).³

Thus, this suit involves the deaths of military men on duty caused by the negligence of F.A.A. employees who were not in the military service or in a military relationship to decedents.

Appellees specifically alleged that their decedents were on active duty at the time of the crash (A1, A3). The motion to dismiss was based upon appellant's conclusion that "active duty" is synonymous with "incident to service" (R11, 13, 39). In opposition, appellees demonstrated that incident to service is defined to apply when a military

² Parenthetical references preceded by "A" identify the pages of appellees' Appendix. It consists of the complaint (A1-A4), and the Memorandum of Decision and Order (A5-A12) which denied appellant's motion to dismiss. The district court's opinion is reported at 261 F. Supp. 252.

³ Parenthetical references preceded by "R" identify the page numbers of the Record on Appeal.

man on active duty sustains injury by the negligence of others in military service (R27-28). As an exception to the general rule of Government liability, incident to service was shown to serve the purpose of preserving the military relationship between all servicemen on duty (R27-31). Since neither the definition nor the purpose of the exception applied to the facts, appellees sought denial of the motion.

The district court held that application of the incident to service exception depended upon whether the deaths were caused by activities involving an official military relationship between the negligent person and the claimant (A11). Since the F.A.A. was not a part of the military and the relationship to the decedents was the same as that between the F.A.A. and all passengers, the court denied the motion and held liability would be imposed upon the Government if appellees could prove the negligence alleged (A12).

Despite this, appellant's statement and argument assert that the subject deaths "concededly" and "undisputed[ly]" were incident to service (Brief, pp. 3 and 5, respectively).⁴ Appellees have consistently stated the contrary (R27, R30-31). These assertions by appellant beg the precise question at issue.

Question Presented

Whether the Government is liable under the F.T.C.A. or the incident to service liability exception is applicable when civilian employees of the F.A.A., an independent non-military agency having no military relationship to aircraft passengers who are military men on active duty, negligently cause the deaths of said servicemen.⁵

⁴ To support its erroneous assertions, appellant cites its own motion (R6-7) and brief below (R10-13).

⁵ The district court was the first and is to date the only court to consider, discuss or decide the issue presented, or any similar question. Thus, the issue at bar involves a decision of first impression.

Statute Involved

The pertinent parts of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2674, are presented on page 4 of appellant's brief and respectfully adopted here.

It is, however, pertinent to add that 28 U.S.C. § 2680 provides:

“Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to —”

thirteen different situations. None of these exceptions to liability apply at bar. The Act contains no incident to service exception.

Summary of Argument

Aside from the statutory exceptions, the Federal Tort Claims Act language and congressional history impose liability upon the Government for its negligence in “any claim”, not “any claim but that of servicemen”, *Brooks v. United States*, 337 U. S. 49, 51 (1949).

None of the statutory exceptions applies. A liability exception named “incident to service” was judicially created and applies only when military men “on active duty and not on furlough sustained injury due to negligence of others in the armed forces”, *Feres v. United States*, 340 U. S. 135, 138 (1950). The reasons justifying the incident to service exception are the “special relationship of the soldier to his superiors” and the maintenance of “discipline”, both of which would be adversely affected by damage suits arising from “negligent orders given or negligent acts committed in the course of military duty”, *United States v. Brown*, 348 U. S. 110, 112 (1954). “In the last analysis, *Feres* seems best explained by” said reasons

for the exception, *United States v. Muniz*, 374 U. S. 150, 162 (1963). This is the most recent explanation of *Feres'* scope by the Supreme Court.

Neither the holding of *Freres* (as distinguished from its alleged *obiter dictum*) nor the reasons justifying the existence of the incident to service exception apply to the facts at bar. The negligent F.A.A. employees were not "in the armed forces"; therefore, the exception is inapplicable. Beyond this, the F.A.A. employees were not in a "special relationship" to decedents comparable to that of the "soldier to his superiors", were not acting "in the course of military duty"; and were part of an independent civilian agency separate from the military establishment and the Department of Defense. Thus, there is no reason to apply or enlarge the definition or the scope of the exception. That prerogative rests with Congress or the Supreme Court.

The relationship between the F.A.A. and decedents was non-military and identical to that between the F.A.A. and all aircraft passengers. Thus, for deaths of passengers caused by the negligence of the F.A.A., the Government is liable under the Federal Tort Claims Act for wrongful death damages, *Ingham v. United States*, 373 F. 2d 227 (2d Cir.), *cert. denied*, — U. S. — (November 6, 1967); *cf. United States v. Furumizo*, 381 F. 2d 965 (9th Cir. 1967).

ARGUMENT

POINT I

When negligent civilian employees of the Federal Aviation Agency, having no military or similar relationship to aircraft passengers who are active duty servicemen, cause their deaths, the incident to service exception is inapplicable and the Government is liable under the F.T.C.A.

In 1946, shortly after the close of World War II, the Federal Tort Claims Act was enacted. It imposed liability upon the Government for the negligence of its employees, 28 U.S.C. § 1346(b) and 2674. The general rule of liability made no distinction with regard to the status of the claimant, and, therefore, gave the same rights to the public and military personnel. The Act provided for exceptions to liability in a number of specified circumstances, 28 U.S.C. § 2680. None of the statutory exceptions existing from the time of the F.T.C.A. enactment to the present apply to the facts at bar. The statute has never contained an "incident to service" or similar exception to liability.

The first case under the Tort Claims Act to reach the United States Supreme Court was *Brooks v. United States*, 337 U. S. 49 (1949). It was concerned with two claims arising from the death of and personal injury sustained by Army servicemen on furlough who were involved in a vehicular collision with an Army truck negligently driven by a civilian employee of the Army. The Supreme Court held the Government liable by analyzing the Act and its legislative history:

"The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve

exceptions [citations]. None exclude petitioners' claims. . . . Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim.' It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain." 337 U. S. at 51.

The last quoted sentence refers to 28 U.S.C. § 2680 which provides that the Government shall not be liable in "(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war" and "(k) Any claim arising in a foreign country." The district court at bar considered these statutory exceptions and stated that they "would seem to indicate an intention to permit servicemen to assert claims arising in this country and not related to combatant activities" (A6).

The Court in *Brooks* then referred to the legislative history:

"More than the language and framework of the act support this view. There were eighteen tort claims bills introduced in Congress between 1925 and 1935. All but two contained exceptions denying recovery to members of the armed forces. *When the present Tort Claims Act was first introduced, the exception concerning servicemen had been dropped.* What remained from previous bills was an exclusion of all claims for which compensation was provided by the World War Veterans Act [citation], compensation for injury or death occurring in the first World War. HR 181, 79th Cong 1st Sess. When HR 181 was incorporated into the Legislative Reorganization Act, *the last vestige of the exclusion for members of the armed forces disappeared.*" 337 U. S. at 51-52. (Emphasis added.)

The incident to service exception to the Act was judicially created by *Feres v. United States*, 340 U. S. 135 (1950). It decided three cases, *Feres*, *Jefferson* and *Griggs*, in the same opinion. In posing the issue, the Supreme Court held:

“The common fact underlying the three cases is that each claimant while *on active duty* and not on furlough sustained injury due to negligence of others in the armed forces.” At page 138. (Emphasis added.)

The Court further held that federal law applied exclusively and declined to refer to the state law of the place where the wrongful act or omission occurred on the grounds:

“That the geography of an injury should select the law to be applied to his tort claims makes no sense. . . . It would hardly be a rational plan of providing for *those disabled in service by others in service* to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value.” At page 143. (Emphasis added.)

Having posed the issue for decision and resolved that federal not state law governed with *precise* references to servicemen injured by *other servicemen*, *Feres* denied liability. Under the facts and the issue before the Court, as well as their characterization in the two quotations presented above, incident to service was thus defined and applied to active duty servicemen injured by the negligence of other servicemen. Appellees respectfully contend that this, and only this is the *Feres* holding.

Appellant, citing *Feres*, contends that incident to service relates exclusively to and would bar recovery by the military man on duty injured by the negligence of a non-military civilian employee of the Government. Since *Feres* was not presented with such facts for decision, to uphold appellant's contention would require: an expansion

of *Feres* beyond its factual scope and holding; a finding of the presence of *obiter dictum* in *Feres*; and reliance upon such *dictum* to deny liability at bar. It is respectfully submitted, particularly in view of *Brooks*, *Brown* and *Muniz*, that expansion of *Feres* is not warranted by fact, reason, equity or law, that *Feres* did not enunciate *dictum*, and that, if it exists, reliance thereon is also not warranted. Expansion and application of *Feres* to the facts at hand should be an issue to be specifically resolved by Congress or the Supreme Court.

Appellant, to support its contention, repeatedly cites the final paragraph of *Feres* and the phrase therein which precluded liability "to servicemen where the injuries arise out of or are in the course of activity incident to service". 340 U. S. at 146. Appellees submit that this final phrase corresponds to and is not different from the earlier characterizations in the *Feres* opinion: military men "on active duty [injured by] the negligence of others in the armed forces" and "disabled in service by others in service". 340 U. S. at 138 and 143, respectively. Even if *dictum* was enunciated, no justification for reliance thereon has been suggested by appellant. The district court properly viewed the final phrase as no longer authoritative (A6). The court did not conclude that the *Feres* holding lacks authority.

In addition to the language of *Feres*, due consideration should be given to the reasons justifying the incident to service exception to the general rule of Government liability.

In the *Griggs* case, one of the three decided by *Feres*, the Government's brief to the Supreme Court stated the reasons,⁶ none of which apply to the facts at bar:

"... the need for avoiding application of state laws to military matters, . . . the desirability of *avoiding*

⁶ The briefs submitted by the Government in the *Jefferson* and *Feres* cases referred to the reasons presented by the *Griggs* brief.

judicial review of military orders, and . . . the postulate that military discipline must not be impaired.

* * *

His being on active duty in the armed forces required him to submit to that operation by an Army surgeon *only because of the military relationship* between the two of them.” At pages 4 and 26. (Emphasis added.)

In its brief here, the appellant agrees that “the rule of non-liability to servicemen injured ‘incident to service’ is designed to avoid interference with military discipline . . .” (Brief, p. 10). This admission is pertinent. Imposition of liability upon the Government for negligence of the F.A.A. cannot interfere in any way with military discipline. After quoting *Feres*’ final phrase, the appellant asserts that the Supreme Court has never limited *Feres* to situations threatening military discipline, *ibid*. The contrary is true.

The limited scope of and reasons for the incident to service exception were presented by *United States v. Brown*, 348 U. S. 110 (1954), and *United States v. Muniz*, 374 U. S. 150 (1963).

In *Brown*, a veteran suffering from a knee injury, which occurred when on active duty, was negligently treated after discharge by a veterans administration hospital. In upholding the claim, the Supreme Court analyzed *Feres*:

“The *Feres* decision involved three cases, in each of which the injury, for which compensation was sought under the Tort Claims Act, occurred while the serviceman was on active duty and not on furlough; and *the negligence alleged in each case was on the part of other members of the Armed Forces. . . . The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for*

negligent orders given or *negligent acts committed in the course of military duty*, led the Court to read that Act as excluding claims of that character.” 348 U. S. at 111-112. (Emphasis added.)

The most recent explanation by the Supreme Court of the incident to service exception was presented by Mr. Chief Justice Warren in a unanimous opinion in *Muniz*. An inmate of a federal prison was injured as a result of the negligence of prison guards and officials. In upholding the imposition of liability upon the Government, *Feres* was discussed at length and then characterized:

“In the last analysis, *Feres* seems best explained by the ‘peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline and . . . orders given or . . . *acts committed in the course of military duty, United States v. Brown.*’” 374 U. S. at 162. (Emphasis added.)

Thus, *Brown* and *Muniz* recognized that *Feres*’ holding was confined to servicemen injured by servicemen. Furthermore, *Brown* and *Muniz* limited to scope of *Feres* to situations embraced by the reasons for the exception.

The approach of *Muniz* to exemptions from liability of the Government was also presented:

“The Federal Tort Claims Act provides much-needed relief to those suffering injury from the negligence of government employees. We should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress. As we said in [citation] ‘There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.’ ” 374 U. S. at 165-166.

To summarize all of the previous discussion, *Feres*, standing alone, established one basic proposition: the incident to service exception precludes Government liability when a military man on active duty is caused injury or death by the negligence of another in military service. Correspondingly, the exception does not apply when a military man on duty is caused injury or death by the negligence of others *not* in the “armed forces” and *not* in the military “service”. 340 U. S. at 138 and 143. *Brown* and *Muniz* reaffirmed this basic proposition and its corollary, and, in addition, articulated the reasons justifying the exception, thereby limiting its scope and application to cases where a military relationship exists between the injured or deceased serviceman and the tortfeasor upon whose negligence the claim is founded. 348 U. S. at 111-112, and 374 U. S. at 162. *Brooks* established that the F.T.C.A. allows and Congress intended military men to recover, unless embraced by a liability exception. 337 U. S. at 51-52. The *Muniz* view was that exemptions from Government liability should be specified only by Congress and then narrowly applied. 374 U. S. at 165-166.

Feres’ holding, *standing alone and fully authoritative*, compels denial of appellant’s motion. The negligent F.A.A. employees were not in the armed forces or in military service. Furthermore, the F.A.A. was a totally independent civilian agency, 49 U.S.C. § 1341(a). The decedents, as all military men, were in a branch of service within the Department of Defense, 50 U.S.C. § 401. The F.A.A. and the Department were independent and not subject to the command of each other. The same is true of the decedents and the negligent F.A.A. employees.

Thus, it is not necessary to conclude that the *Feres* holding has been further limited or modified by *Brown* or *Muniz* in order to affirm denial of the motion to dismiss. In Point II, *infra* at pages 14-19, appellees will demonstrate that every incident to service case cited by appellant is

consistent with and fully explained by the basic holding of *Feres*.

Beyond this position, appellees respectfully contend that *Brooks*, *Brown* and particularly *Muniz* limit the scope and application of the incident to service exception to cases where a military relationship exists between the serviceman and the negligent civilian employee. The district court's reasoned analysis came to this conclusion after considering the cases and the same arguments presented here by appellant. None of the reasons justifying the liability exception apply to the instant facts. There was no military relationship between the decedents and the negligent F.A.A. employees. Their relationship was not comparable to that of the soldier to his superior, another military man, or, indeed, a civilian in position of command or position similar to decedents' rank. Military discipline was not involved. Affirmance of the denial of the motion could not affect military relationships or discipline, or be deemed to constitute judicial review of military orders or activities. Rather, the relationship existing at bar was identical to that between the F.A.A. and passengers aboard all aircraft; therefore, the same F.T.C.A. liability should obtain. *Ingham v. United States*, 373 F. 2d 227 (2d Cir.), *cert. denied*, — U. S. — (November 6, 1967); *cf. United States v. Furumizo*, 381 F. 2d 965 (9th Cir. 1967). Since the reasons justifying incident to service are inapplicable, the exception should not apply.

No sound reason exists to expand the application of *Feres* beyond the facts with which it was concerned.

POINT II

Appellant's citations are consistent with and explained by *Feres'* holding that the exception applies to active duty servicemen injured by other military men, as well as by the *Brown*, *Muniz* and district court conclusion that the exception applies only when a military relationship exists.

Appellant cites a number of Courts of Appeals to support its contention that all active duty servicemen injured by any negligent Government employee fall victim to the incident to service exception.

Appellees respectfully submit that the cases cited are consistent with and fully explained by *Feres'* holding that the exception applies to active duty servicemen injured by other military men. The cases establish a pattern corroborating the holding in *Feres*. They can also be consistently explained by the military relationship restriction placed upon *Feres* by *Brown* and *Muniz*, and followed by the district court in the instant case. Furthermore, no case has been found which discusses or decides the question at issue.

Callaway v. Garber, 289 F. 2d 171 (9th Cir.), *cert. denied*, 368 U. S. 874 (1961), involved the death of an Air Force sergeant journeying by car to a training school pursuant to military orders. A collision and his death were caused by the negligence of a Navy recruiting officer who was performing his military duties. This Court held that the journey to the school

“ . . . was as much a part of his duty as the training itself. *The person responsible for the injury was another serviceman following out and in the course of his duties.*” At page 173. (Emphasis added.)

The incident to service exception was applied and the denial of Government liability affirmed. Both the claim-

ants and the negligent person were “on active duty” and “in the armed forces”, *Feres v. United States*, 340 U. S. 135, 138 (1950); therefore, *Callaway* is consistent with, explained by and corroborative of the *Feres* holding.

With regard to the military relationship restriction imposed upon *Feres*, this Court, after considering *United States v. Brown*, 348 U. S. 110 (1954), particularly the “basic reasons underlying” the exception, concluded:

“The instant case can find no shelter within those reasons, since the negligent and the injured parties here were members of different branches of the service and were engaged in entirely different and unconnected activities at the time of the accident.” 289 F. 2d at 173-174.

Appellees most respectfully suggest that, despite the different branches and unconnected activities, since *Callaway* and *Garber* were military men on official duty, their actions were subject to scrutiny by superiors, and subject to the Uniform Code of Military Justice, 10 U.S.C. § 801, *et seq.* Military discipline was a factor involved. The litigation, therefore, affected military relationships and discipline. In any event, the *subsequent* unanimous opinion in *United States v. Muniz*, 374 U. S. 150 (1963), limited *Feres* “in the last analysis” (at p. 162) to the military relationship situation. *Muniz* also viewed exemptions from Government liability with disfavor, and as the prerogative of Congress, and subject to narrow application. Thus, if the alleged *dictum* in *Feres* is “no longer authoritative” (A6) by virtue of *Muniz*, then *Callaway* may properly be examined further and is not inconsistent with affirmance at bar on the military relationship analysis.

Appellant also cites three cases which can be considered together because they involve common facts. *Archer v. United States*, 217 F. 2d 548 (9th Cir. 1954), *cert. denied*, 348 U. S. 953 (1955); *United States v. Carroll*, 369 F. 2d

618 (8th Cir. 1965); and *Sheppard v. United States*, 369 F. 2d 272 (3d Cir. 1966), *cert. denied*, 386 U. S. 982 (1967), involved servicemen on active duty. In each, the claim was based upon the negligence of other members of the armed forces. The three cases, therefore, form the familiar pattern and are embraced by the basic proposition—holding:

“each claimant while on active duty . . . sustained injury due to negligence of others in the armed forces.”
Feres v. United States, 340 U. S. 135, 138 (1950).

In *Archer*, this Court affirmed the grant of the Government’s motion for summary judgment on the ground that the deceased West Point cadet “was in line of duty” and “under military discipline on an army plane under control of a superior officer”; therefore, the incident to service exception applied to preclude recovery for the negligence of the army’s pilot. 217 F. 2d at 551. In *Carroll*, the “plaintiff was a naval reservist traveling in uniform to a weekend drill with other members of his military unit.” 369 F. 2d at 619. He was injured while a passenger aboard a naval aircraft negligently operated by a navy pilot on active duty. Upon “entering the plane, however, the reservists were under the command of the naval officers in charge of the plane.” At page 620. The court held the plaintiff was on active duty and a military relationship existed between him and the crew; therefore, it exempted the Government from liability for the crew’s negligence. In *Sheppard*, the same accident as the one at bar, the plaintiffs claimed negligence by military men. The court affirmed dismissal of the complaint which alleged:

“As a result of the negligence, carelessness and recklessness of defendant’s agents, servants, and employees, to wit, members of the United States Air Force and others, in the maintenance, operation, and control of said aircraft, said aircraft crashed on June 25, 1965

in the state of California, shortly after takeoff from El Toro Air Force Base.” Paragraph 4 of the Complaint, Plaintiffs-Appellants’ Appendix, page 2a.

Neither the complaint nor the plaintiffs-appellants’ brief claimed negligence by the F.A.A. or any other civilian employees. The claims were founded upon Air Force negligence and the contentions that *Feres* was either overruled or so limited as to allow suits between military men in different branches of service who were not in a command relationship. The court held *Feres*’ validity was not destroyed by subsequent decisions. *Sheppard*’s holding, therefore, is consistent with and explained by the *Feres* holding. The *Sheppard* court, however, was not presented with the question at bar or the military relationship issue of a serviceman vis-a-vis a civilian or an F.A.A. employee of the Government.⁷ The *Sheppard* plaintiffs’ claim that no military relationship existed between the decedents and the Air Force crew is not substantiated by fact or law. *Archer* and *Carroll* both held that military passengers aboard a military aircraft were subject to the command of the crew.

In *Layne v. United States*, 295 F. 2d 433 (7th Cir. 1961), cert. denied, 368 U. S. 990 (1962), the court affirmed dismissal of a complaint upon motion for summary judgment. Decedent was an Air National Guard pilot who was killed by the negligence of F.A.A. employees. Aside from a procedural problem, the sole issue presented, briefed, discussed and decided was whether decedent was on active duty with the United States. Plaintiff contended the decedent was on duty with the National Guard, not the

⁷ Appellees respectfully present in the Supplement papers in further *Sheppard* proceedings which may not be readily available to this Court. Pages S1-S5 set forth a new complaint filed after the petition for certiorari was denied. Government’s motion and supporting and opposing papers appear at S6-S12. The court’s order is at S13.

United States. The court held the contrary was the fact. An examination of plaintiff Layne's brief discloses that the sole question was whether decedent was on active duty with the federal government. At no time did plaintiff assert that an active duty serviceman can recover for F.A.A. negligence.⁸ In addition, the basic proposition-holding of *Feres* was not raised by plaintiff or discussed by the court. Due undoubtedly to plaintiff's failure to discuss the precise holding of *Feres*, the court assumed, without deciding, that a finding that decedent was on duty in the service of the United States was dispositive. As demonstrated at bar, such a finding constituted resolution of a threshold question (like *Brooks*) which does not decide or affect the question presented here.

Four additional cases relating to incident to service were cited by appellant in footnotes. These cases commonly involved claims by servicemen on active duty injured by the negligence of other servicemen on duty.⁹

⁸ In these circumstances, it is hardly justifiable for appellant at bar to state that the district court's view of *Feres* was "considered and rejected" by Layne (Brief, pp. 6-7).

⁹ In *United Air Lines, Inc. v. Wiener*, 335 F. 2d 379 (9th Cir.), *petition for cert. dismissed*, 379 U. S. 951 (1964), active duty military men were killed when an aircraft, in which they were riding as passengers, collided in mid-air with a military jet piloted by an Air Force officer. No action was commenced against the Government by the estates of the servicemen-passengers. In *Chambers v. United States*, 357 F. 2d 224 (8th Cir. 1966), the decedent-serviceman drowned, while on duty training for underwater activities and subject to the command of his superiors, as a result of military negligence. In *Zoula v. United States*, 217 F. 2d 81 (5th Cir. 1954), several Army servicemen on duty at a military post were injured as a result of the negligence of another Army serviceman who was driving an Army ambulance. Finally, in *Van Sickel v. United States*, 285 F. 2d 87 (9th Cir. 1960), a Marine Corps sergeant on active duty died as a result of malpractice committed by a Navy doctor at a naval hospital. The decedent's widow attempted to maintain suit under California statutes rather than the F.T.C.A.

Thus, all of the incident to service cases cited by appellant establish a specific pattern consistent with, explained by and supportive of appellees' alternative positions: for the *Feres* holding to apply, the active duty decedents' deaths must be caused by the negligence of another military serviceman, not by the non-military civilian employees of the F.A.A.; the incident to service exception applies when a military or similar command relationship exists between the decedent and the negligent Government employees, no such relationship existing at bar.

No cited case or any that appellees have found discusses or decides the question presented at bar, except the considered opinion of the district court below.

Appellant seeks to broaden the incident to service exception and limit the scope of Government liability. It is respectfully submitted, therefore, that the Government is charged with and has not sustained the burden of persuasion by reference to pertinent authority or sound reason. Appellees submit that the facts at bar, reason, equity and authority justify the present containment of the exception to the general rule of liability. To enlarge the scope of the exception is the prerogative of Congress or the Supreme Court.

POINT III

Since none of the exclusive remedy statutes benefit appellees, they are entitled to recover under the F.T.C.A.

Appellant cites seven cases arising under various exclusive remedy statutes in an attempt to suggest that appellees are affected by them in some manner not yet articulated. The statutes cited are inapplicable to and do not benefit the appellees.

Appellant, however, has cited no exclusive remedy statute which grants benefits to the widow and children of each decedent. No such statute exists.

Specifically, the Government refers to *O'Leary v. Brown-Pacific-Maxon*, 340 U. S. 504 (1951), involving the Long-shoremen's and Harbor Workers' Compensation Act; *United States v. Demko*, 385 U. S. 149 (1966), involving the Federal Prisoners Compensation Act; *United States v. Forfari*, 268 F. 2d 29 (9th Cir.), *cert. denied*, 361 U. S. 902 (1959), involving a state workmen's compensation act; *Patterson v. United States*, 359 U. S. 495 (1959) and *Johansen v. United States*, 343 U. S. 427 (1951), both involving the Federal Employees Compensation Act which specifically applies only to civilian employees of the Government; and *Preferred Ins. Co. v. United States*, 222 F. 2d 942 (9th Cir.), *cert. denied*, 350 U. S. 837 (1955) and *Zoula v. United States*, 217 F. 2d 81 (5th Cir. 1954), both involving the Military Personnel Claims Act which provides benefits solely for property damage.

When benefits are obtained under a veterans act or any other statute which does not specifically provide exclusivity of remedies, no election of remedies can be implicitly imposed. In *Brooks v. United States*, 337 U. S. 49 (1949), the Court stated:

"Unlike the usual workmen's compensation statute [citation], there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy. [Citation.] Nor did Congress provide for an election of remedies, as in the Federal Employees' Compensation Act [citations]. We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so." At page 53.

Accord, United States v. Brown, 348 U. S. 110 (1954).

The irrelevance of the exclusive remedy cases cited by appellant is thus demonstrable.

CONCLUSION

For the reasons stated, the order appealed from should be affirmed.

Respectfully submitted,

SAMUEL M. HECSH,
Attorney for Appellees,
110 West C Street,
San Diego, California 92101.

714-234-3441

Of Counsel:

KREINDLER & KREINDLER,
by Lee S. Kreindler,
Milton G. Sincoff,
George E. Farrell,
99 Park Avenue,
New York, New York 10016.

212-687-8181

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

November 22, 1967.

s/ MILTON G. SINCOFF,
Milton G. Sincoff,
Counsel for Appellees,
99 Park Avenue,
New York, New York 10016.

Affidavit of Service

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MILTON G. SINCOFF, being duly sworn, deposes and says:

That on November 22, 1967, he caused three copies of the foregoing Brief for the Appellees with Appendix and Supplement to be served by air mail, postage prepaid, upon counsel for Appellants:

William M. Byrne, Jr., Esq.
United States Attorney
600 United States Courthouse
312 North Spring Street
Los Angeles, California 90012

and

Carl Eardley, Esq.
Acting Assistant Attorney General
Morton Hollander, Esq.
Leonard Schaitman, Esq.
Attorneys
United States Department of Justice
Washington, D. C. 20530

s/ MILTON G. SINCOFF,
Milton G. Sincoff,
Counsel for Appellees,
99 Park Avenue,
New York, New York 10016.
212-687-8181

Sworn to before this this
22nd day of November, 1967

GERALD A. ROBBIE,
Notary Public,
State of New York,
No. 31-8591670,
Qualified in New York County,
Term Expires March 30, 1968.

[SEAL]

APPENDIX

Complaint.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION.

ARDELL LEE, individually, as Administratrix of the Estate of JAMES E. LEE, deceased, and as the Mother, Next Friend, Natural Guardian and Representative of REGINALD A. LEE, RONALD H. LEE and ARNELL LEE, infants,

and

BETTY MOORE, individually, as Administratrix of the Estate of RALPH E. WHITE, deceased, and as Mother, Next Friend, Natural Guardian and Representative of RALPH M. WHITE and JON E. WHITE, infants,

Plaintiffs,

against

UNITED STATES OF AMERICA,

Defendant.

Plaintiffs, by their attorney, Samuel N. Heesh, complaining of the defendant, respectfully allege:

A FIRST CLAIM FOR THE WRONGFUL DEATH OF
JAMES E. LEE

FIRST: Jurisdiction is founded on 28 United States Code, Section 1346, commonly referred to as the Federal Tort Claims Act.

SECOND: On the 25th day of June, 1965, Sergeant James E. Lee, deceased, then on active duty in the United States

Complaint.

Marine Corps, was a passenger aboard a certain Boeing C-135A aircraft, 60-373A, being operated by the Military Air Transport Service, United States Air Force.

THIRD: On the 25th day of June, 1965, said aircraft crashed in the vicinity of Santa Ana, California.

FOURTH: At all times mentioned hereafter, defendant United States of America, through its Federal Aviation Agency, a division of the Government separate and apart from either the United States Marine Corps in which the decedent was serving, or from the United States Air Force that was operating the aircraft, owned, operated and controlled certain radar, and certain electronic and radio facilities which were used by it to control, advise, direct and inform aircraft departing the Marine Corps Air Station, El Toro, Santa Ana, California.

FIFTH: At all times mentioned hereinafter, defendant United States of America through its Federal Aviation Agency, developed and approved Standard Instrument Departures (SIDs), and other navigational data, which were used by aircraft departing the Marine Corps Air Station, El Toro, Santa Ana, California.

SIXTH: On the 25th day of June, 1965, prior to and at the time of said crash, the previously described aircraft of the United States Air Force was departing the Marine Corps Air Station, El Toro, Santa Ana, California, while receiving control, advice, and direction from defendant United States of America's Federal Aviation Agency employees who were acting within the scope of their employment, and in accordance with the Standard Instrument Departure, and other navigational data, which had been prepared and approved by the defendant's Federal Aviation Agency employees who were acting within the scope of their employment.

Complaint.

SEVENTH: Said crash was caused by the negligence of defendant United States of America's Federal Aviation Agency in carelessly operating, maintaining, and controlling the departure of said aircraft from the Marine Corps Air Station, El Toro, Santa Ana, California, and in carelessly controlling, advising, directing and informing said aircraft of dangerous terrain in the vicinity of the airport, in providing a departure procedure which incorporated inadequate terrain clearance information, and in other respects.

EIGHTH: Said crash caused the death of James E. Lee, deceased, who was and is survived by his wife, plaintiff Ardell Lee, and their three infant children, Reginald A. Lee, Ronald H. Lee and Arnell Lee.

NINTH: Solely as a result of the death of James E. Lee, deceased, his widow and their three infant children have sustained pecuniary injuries, including loss of support, services, paternal guidance and training, and the prospects of inheritance of future accumulations.

TENTH: By reason of these premises the plaintiff Ardell Lee has been damaged in the sum of Two Hundred Thousand (\$200,000) Dollars.

A SECOND CLAIM FOR THE WRONGFUL DEATH OF
RALPH E. WHITE

ELEVENTH: Plaintiff Betty Moore realleges each statement in paragraphs "First", "Third", "Fourth", "Fifth", "Sixth" and "Seventh".

TWELFTH: On the 25th day of June, 1965, Corporal Ralph E. White, deceased, then on active duty in the United States Marine Corps, was a passenger aboard said aircraft.

Complaint.

THIRTEENTH: Said crash caused the death of Ralph E. White, deceased, who left surviving him his wife, plaintiff Betty Moore and their two infant children, Ralph M. White and Jon E. White.

FOURTEENTH: Solely as a result of the death of Ralph E. White, deceased, his widow and their two infant children have sustained pecuniary injuries, including loss of support, services, paternal guidance and training, and the prospects of inheritance of future accumulations.

FIFTEENTH: By reason of these premises, plaintiff Betty Moore has been damaged in the sum of Two Hundred Thousand (\$200,000) Dollars.

WHEREFORE, plaintiff Ardell Lee demands judgment against the defendant on the First Claim in the sum of Two Hundred Thousand (\$200,000) Dollars; plaintiff Betty Moore demands judgment against the defendant on the Second Claim in the sum of Two Hundred Thousand (\$200,000) Dollars, together with interest, costs and disbursements of this action.

Dated: San Diego, California, June 21, 1966.

/s/ SAMUEL N. HECSH,
Samuel N. Hecsh,
Attorney for the Plaintiffs,
1106 Bank of America Building,
San Diego, California 92101.
234-3442

Of counsel,

KREINDLER & KREINDLER,
99 Park Avenue,
New York, New York 10016.
Mu 7-8181.

Memorandum of Decision and Order.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CIVIL No. 66-1052-WPG

ARDELL LEE, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Two enlisted men of the United States Marine Corps, on active duty, were in process of being transferred to Viet Nam, and for that purpose they were placed on board an airplane operated by the Military Air Transport Service, United States Air Force. In the course of taking off from the El Toro Marine Corps Air Station, California, to begin the overseas flight, the airplane crashed, and the two servicemen, along with many other people, were killed. Their personal representatives bring this action under the Federal Tort Claims Act, 28 U.S.C. sections 1346(b) and 2671 et seq. The complaint makes no charge against the Marine Corps or against MATS; it alleges, instead, that the crash was caused by the negligence of the Federal Aviation Agency in operating, maintaining and controlling the departure of the aircraft from the ground and in giving inadequate terrain clearance information.

The Government has moved to dismiss the action on the ground that, as a matter of law, the facts here concerned preclude recovery under the Tort Claims Act. The issue thus raised has been briefed by both sides, argued orally and submitted to the Court for decision.

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The position of the Government is well summarized by the following sentence from Justice Jackson's opinion in *Feres v. United States*, 340 U. S. 135, 146 (1950):

“We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”

If this is a correct statement of the law, the case at hand must be dismissed, because the deaths of the two servicemen clearly were in the course of activity incident to their service with the Marine Corps.

However, for reason hereinafter set forth, it is my conclusion that the above quoted sentence is no longer authoritative, that under present law these plaintiffs are not precluded from seeking relief under the Federal Tort Claims Act, and that the motion to dismiss must therefore be denied.

The terms of the statute, itself, give no indication that servicemen injured under the circumstances here concerned are to be deprived of the benefits of the Act. On the contrary, the fact that section 2680 specifically excludes “Any claim arising out of the combatant activities of the military or naval forces . . . during time of war” and “Any claim arising in a foreign country,” would seem to indicate an intention to permit servicemen to assert claims arising in this country and not related to combatant activities. In this respect, the same conclusion was asserted by Justice Murphy, in speaking for the Court in *Brooks v. United States*, 337 U. S. 49 (1949). He pointed out that the Tort Claims Act, with the exceptions therein specified, provides for District Court jurisdiction over any claim for personal injury or death founded upon negligence, and he expressed disbelief that “‘any claim’ means ‘any claim but that of servicemen’.” He also said that “It would be absurd to

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believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain." (Page 51.)

In *Brooks*, two servicemen were riding in their automobile with their father along a public highway in North Carolina. They were doing so for their own purposes and presumably were on pass or furlough. One was injured and the other was killed when their car was struck by a United States Army truck. The Supreme Court held that the plaintiffs' action under the Tort Claims Act had been well founded.

In the course of his opinion in *Brooks*, Justice Murphy acknowledged that to adhere to the literal language of the statute and allow recovery to servicemen irrespective of how their injuries related to military service, might bring about outlandish results that Congress clearly would not have intended. "A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, . . ." occurred to the Court as examples in which the allowance of recovery would be incongruous. However, the opinion emphasized that the accident to the Brooks brothers had nothing to do with their military careers, and it asserted that the Court withheld comment as to a case involving an accident incident to such service.

Feres v. United States, 340 U. S. 135 (1950) was just such a case; actually there were three combined cases. In one, a soldier was quartered in barracks that should have been known to be unsafe because of a defective heating plant, and he died in the ensuing fire. The other two cases involved negligence by army surgeons in the course of medical operations upon servicemen. In each of the three instances recovery was sought under the Federal Tort Claims Act and the Supreme Court denied relief.

Justice Jackson wrote the opinion of the Court. He noted at the outset that three cases had in common the

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fact that “. . . each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces.” (Page 138.)

It is to be noted that the first of these quoted circumstances distinguishes the *Feres* case from *Brooks*, and the second distinguishes *Feres* from the case at hand. However, throughout the balance of his opinion, Justice Jackson ignored the latter aspect of the factual proposition that he had expressed, and he considered the only question to be whether the Tort Claims Act extends its remedy to any serviceman who receives injury incident to his military service. He answered this question in the negative, and we now consider the reasons given for such conclusion and how they have survived subsequent examination by the Supreme Court.

1. The opinion in *Feres* reasoned that the primary purpose of the Tort Claims Act was to provide a remedy to those who had been without, as reflected in the large number of private bills that had stemmed from torts suffered at the hands of Government employees; that there had been no large number of private bills on behalf of military personnel, because they and their dependents had already been given a comprehensive system of relief; and that it therefore followed that Congress had not intended to benefit servicemen in the passage of the Tort Claims Act. Similarly, it was suggested that Congress presumably would not have intended to permit servicemen to have double recovery, and that therefore the failure of the Tort Claims Act to provide for adjustment between the relief therein granted and the military disability and death benefit system, indicated that the latter is to be the exclusive remedy.

This argument was specifically rejected four years later in *United States v. Brown*, 348 U. S. 110 (1954). There, a veteran had received a service connected injury to his knee,

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for which he was receiving compensation. The need for a further operation arose, and in the course of performing such operation the doctor in the Veterans Administration hospital negligently caused serious further and permanent damage to the patient's leg. The Supreme Court held that recovery under the Tort Claims Act should be allowed. The opinion referred to the decision in *Brooks* as having concluded “. . . that Congress had given no indication that it made the right to compensation the veteran's exclusive remedy, that the receipt of disability payments under the Veterans Act was not an election of remedies and did not preclude recovery under the Tort Claims Act but only reduced the amount of any judgment under the latter Act.” The next sentence stated: “We adhere to that result.” (Page 113.)

Likewise, in *United States v. Muniz*, 374 U. S. 150, 160 (1963), Chief Justice Warren, in speaking for the Court said that “. . . the presence of a compensation system, persuasive in *Feres*, does not of necessity preclude a suit for negligence” under the Tort Claims Act. Cf. *United States v. Demko*, 35 U.S. L. Week 4028 (U.S. Dec. 5, 1966).

2. Another argument that was persuasive in *Feres* was that the Tort Claims Act (in section 2674) provides that “The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . .” The opinion reasoned that since private individuals do not maintain military establishments and therefore are not subjected to claims even remotely analogous to those at issue, the statute precluded recovery for the latter claims.

This argument was specifically rejected in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), which allowed recovery for damages resulting from the grounding of a tug due to the negligence of the Coast Guard in the operation of a lighthouse. Justice Reed dissented on the ground

Memorandum of Decision and Order.

that the majority decision had rejected the doctrine of the *Feres* case.

3. Justice Jackson, in *Feres*, also considered it significant that the Tort Claims Act “. . . makes ‘. . . the law of the place where the act or omission occurred’ govern any consequent liability.” (340 U.S. at 142.) He then reasoned that it would not be rational to cause recovery by a serviceman to be governed by the laws of the place where the injuries occurred, inasmuch as he has no control over where his military duties might take him.

Inmates of federal penitentiaries, likewise, have a considerable lack of discretion with respect to the states in which they dwell. But this did not prevent the Court from holding that two such prisoners might recover under the Act for injuries that they sustained due to the negligence of supervisory personnel. *United States v. Muniz*, 374 U.S. 150 (1963). In the course of his opinion for the Courts, Chief Justice Warren adverted to the *Feres* reasoning that is summarized in the preceding paragraph. He thereupon rejected it, concluding with the comment that although the nonuniform right to recover because of varying state laws might possibly prejudice some prisoners, “. . . it nonetheless seems clear that no recovery would prejudice them even more.” (Page 162.)

Although the opinion in *Muniz* expressly stated that the Court found no occasion to question *Feres*, so far as military claims were concerned, it proceeded to discredit or express lack of enthusiasm for each of the reasons upon which the doctrine of that case was founded. Chief Justice Warren concluded his discussion of *Feres* as follows:

“In the last analysis, *Feres* seems best explained by the ‘peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that

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might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . .’ *United States v. Brown*, 348 U. S. 110, 112.” (374 U. S. at 162.)

Thus, we have an explanation of *Feres* that provides the only authoritative and satisfactory basis for the decision that I have been able to find. It would follow therefrom that the exclusion of military personnel from recourse to the Act would not depend upon whether they were on active duty or on leave at the time of their injuries. Instead, it would depend upon whether or not the injuries stemmed from activities that involved an official military relationship between the negligent person and the claimant. If so, the claimant would be precluded; otherwise, he would not. That relationship did exist in *Feres*, and recovery was not allowed. The same was true in *Archer v. United States*, 217 F. 2d 548 (9th Cir. 1954), cert. denied 348 U. S. 953 (1955), in *O’Brien v. United States*, 192 F. 2d 948 (8th Cir. 1951), and in *Van Sickel v. United States*, 285 F. 2d 87 (9th Cir. 1960). Such relationship was not present in *Brooks* or in *Brown*, in which the claimants prevailed. Thus, all of the decided cases are in harmony with this test, with the following exception.

Callaway v. Garber, 289 F. 2d 171 (9th Cir. 1961) involved a situation in which three Air Force sergeants were under orders directing them to go from South Dakota to Seattle, Washington to attend a special service school. They properly chose to make the trip together by private automobile, and while doing so their car was struck by another automobile driven by a recruiting officer of the United States Navy while on official business. One of the three sergeants was killed, and his next of kin brought suit under the Tort Claims Act. The Court of Appeals affirmed the denial of recovery. The opinion, by Judge Orr, set out the hereinabove quoted “explanation” of the *Feres* decision and very aptly observed that those reasons.

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had no relevance to the case at hand, since the official activities of the negligent party and those of the injured parties were entirely unrelated. The opinion then concluded by stating:

“However, the instant case does fall within the rule of the *Feres* case as promulgated, and we must adhere to said rule since it was in no way negated or modified by the later *Brown* case.” (Page 174.)

It seems to me that the negation of the *Feres* rule, for which Judge Orr somewhat wistfully was looking, has been provided by the later *Muniz* decision.

In the present case the two servicemen were killed in the course of their official relationships with the Marine Corps and with MATS. But the Federal Aviation Agency, whose alleged conduct is the only target of this action, is not a part of the military. It is an administrative agency created by Congress and given the responsibility of establishing and operating air navigation facilities and procedures for efficient air safety and traffic control. 49 U.S.C. section 1341 et seq. Such responsibility extends to all airports, civil as well as military. As far as the FAA was concerned, the decedents simply were two passengers in an airplane, just as in *Brooks* the two claimants were in the same position as any other motorist on the highway. Applying the test that I have derived from the hereinabove quoted “explanation” of the *Feres* decision, it follows that recovery by the present plaintiffs under the Tort Claims Act may not be foreclosed to them if they can prove the negligence that they allege.

The defendant’s motion to dismiss the action is denied, and the defendant is given twenty days within which to answer the complaint.

DATED: December 15, 1966.

William P. Gray
WILLIAM P. GRAY
United States District Judge

SUPPLEMENT

Sheppard v. United States

Proceedings in the United States District Court,
Eastern District of Pennsylvania

subsequent to

denial of petition for certiorari,
386 U. S. 982 (1967)

S1

Complaint.

IN THE
UNITED STATES DISTRICT COURT,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 42958

JOSEPH B. SHEPPARD, SR., Administrator of the Estate of
JOSEPH B. SHEPPARD, JR., 544 East Allegheny Avenue,
Philadelphia, Pennsylvania,

and

ANTHONY G. MOCCIA, Administrator of the Estates of
WILLIAM BRADLEY BREON and MICHAEL J. MONDO, JR.,
2021 Rittenhouse Square, Philadelphia, Pennsylvania,

v.

UNITED STATES OF AMERICA.

JURY TRIAL WAIVED

1. Plaintiff, Joseph B. Sheppard, Sr., who is the duly appointed Administrator of the Estate of Joseph B. Sheppard, Jr., and is a citizen of the United States, residing at 544 East Allegheny Avenue, Philadelphia, Pennsylvania, and Anthony G. Moccia, who is the duly appointed administrator of the Estates of William Bradley Breon and Michael J. Mondo, Jr., and is a citizen of the United States residing at 2021 Rittenhouse Square, Philadelphia, Penn-

Complaint.

sylvania, bring each and all of the following counts of this action under the Federal Tort Claims Act, 28 USC §§ 1346(b), 2671 et seq. as hereinafter more fully appears.

2. At all times relevant hereto the defendant was the owner and operator of a C-135 aircraft, Serial No. 00373.

3. On or about June 25, 1965, decedents, Joseph B. Sheppard, Jr., William Bradley Breon and Michael J. Mondo, Jr., then members of the United States Marine Corps, boarded said aircraft as passengers.

4. As a result of the negligence, carelessness and recklessness of certain of defendant's civilian, non-military agents, servants, and employees, to wit, members of the United States Federal Aviation Agency, said aircraft crashed on June 25, 1965, in the state of California, shortly after takeoff from El Toro Air Force Base.

5. As a result of the aforementioned crash decedents, together with sixty-nine other passengers and a crew of twelve, were killed.

FIRST COUNT

6. Paragraphs one to five above are incorporated herein by reference.

7. This action is brought by Joseph B. Sheppard, Sr., father of the decedent, Joseph B. Sheppard, Jr., and administrator of the decedent's estate, to recover damages incurred by himself and Edna Sheppard, mother of the decedent, as a result of the death of their son, including loss of the earnings of the decedent up to the age of twenty-one, loss of support and loss of his services, comfort and society.

Complaint.

WHEREFORE, plaintiff claims damages from defendant in the amount of Three Hundred Thousand Dollars (\$300,000.00).

SECOND COUNT

8. Paragraphs one to five above are incorporated herein by reference.

9. Plaintiff Joseph B. Sheppard, Sr., brings this action as administrator of the Estate of Joseph B. Sheppard, Jr., deceased, to recover damages suffered by the estate as a result of the death of Joseph B. Sheppard, Jr., including loss of earnings and earning power of the decedent and pain and suffering.

WHEREFORE, plaintiff claims damages from the defendant in an amount of Three Hundred Thousand Dollars (\$300,000.00).

THIRD COUNT

10. Paragraphs one to five above are incorporated herein by reference.

11. This action is brought by Anthony G. Moccia, administrator of the Estate of William Bradley Breon to recover damages incurred by Rufus B. Breon, father of the decedent, and Alice Breon, mother of the decedent, as a result of the death of their son, including loss of the earnings of the decedent up to the age of twenty-one, loss of support and loss of his services, comfort and society.

WHEREFORE, plaintiff claims damages from defendant in an amount of Three Hundred Thousand Dollars (\$300,000.00).

Complaint.

FOURTH COUNT

12. Paragraphs one to five above are incorporated herein by reference.

13. Plaintiff Anthony C. Moccia, brings this action as administrator of the Estate of William Bradley Breon, deceased, to recover damages suffered by the estate as a result of the death of William Bradley Breon, including loss of earnings and earning power of the decedent and pain and suffering.

WHEREFORE, plaintiff claims damages from the defendant on each of the above counts in the amount of Three Hundred Thousand Dollars (\$300,000.00).

FIFTH COUNT

14. Paragraphs one to five above are incorporated herein by reference.

15. This action is brought by Anthony G. Moccia, administrator of the estate of Michael J. Mondo, deceased, to recover damages incurred by Agnes Mondo, mother of the decedent, as a result of the death of her son, including loss of the earnings of the decedent up to the age of twenty-one, loss of support and loss of his services, comfort and society.

WHEREFORE, plaintiff claims damages from defendant in the amount of Three Hundred Thousand Dollars (\$300,000.00).

SIXTH COUNT

16. Paragraphs one to five above are incorporated herein by reference.

Complaint.

17. Plaintiff Anthony G. Moccia, brings this action as administrator of the Estate of Michael J. Mondo, Jr., deceased, to recover damages suffered by the estate as a result of the death of Michael J. Mondo, Jr., including loss of earnings and earning power of the decedent and pain and suffering.

WHEREFORE, plaintiff claims damages from the defendant in the amount of Three Hundred Thousand Dollars (\$300,000.00).

/s/ STEPHAN M. FELDMAN,
STEPHAN M. FELDMAN,
JOSEPH G. FELDMAN,
FELDMAN AND FELDMAN,
420 Six Penn Center,
Philadelphia, Pennsylvania,
Attorneys for Plaintiffs.

Of Counsel:

HY MAYERSON, Esq.,
Lewis Tower Bldg.,
Philadelphia, Pennsylvania.

Motion to Dismiss.

IN THE
UNITED STATES DISTRICT COURT,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 42958

JOSEPH B. SHEPPARD, SR., Administrator of the Estate of
JOSEPH B. SHEPPARD, JR.; and ANTHONY G. MOCCIA, Ad-
ministrator of the Estates of WILLIAM BRADLEY BREON
and MICHAEL J. MONDO, JR.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Defendant, United States of America, by its attorney,
Drew J. T. O'Keefe, United States Attorney for the East-
ern District of Pennsylvania, moves this Court to enter an
order dismissing plaintiffs' complaint with prejudice for
the reason that there is a final valid judgment in favor of
the defendant and against the plaintiffs on the same cause
of action asserted in the complaint. The doctrine of *res*
judicata bars this litigation.

DREW J. T. O'KEEFE,
United States Attorney.
By /s/ Joseph H. Reiter,
JOSEPH H. REITER,
Assistant United States Attorney.

Memorandum in Support of Motion to Dismiss.

IN THE
UNITED STATES DISTRICT COURT,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 42958

JOSEPH B. SHEPPARD, SR., Administrator of the Estate of
JOSEPH B. SHEPPARD, JR.; and ANTHONY G. MOCCIA, Ad-
ministrators of the Estates of WILLIAM BRADLEY BREON
and MICHAEL J. MONDO, JR.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

On June 24, 1966, plaintiffs herein instituted Civil Action No. 40541, similarly entitled as the present action, seeking damages for the deaths of three servicemen who were killed in a plane crash while they were on active military duty.

The decedents' deaths were allegedly caused by the negligence of "members of the United States Air Force and others." (Complaint in Civil Action No. 40541, par. 4)

The Government filed a timely motion to dismiss the complaint in Civil No. 40541 upon the ground that the Federal Tort claims Act does not permit suits against the United States for injuries to servicemen in the course of activities incident to their service. *Feres v. United States*, 340 U. S. 135 (1950). This Court, speaking through Judge Davis, dismissed the complaint, holding that plaintiffs' claims for relief were governed by the *Feres* decision.

Memorandum in Support of Motion to Dismiss.

Plaintiffs' appeal was dismissed by the Third Circuit *per curiam* in *Sheppard v. United States*, 369 F. 2d 272 (C. A. 3, 1966). The United States Supreme Court denied certiorari, 386 U. S. 982 (1967).

The complaint in the instant case is identical to the prior action both as to parties and cause of action, that is, plaintiffs seek remuneration from the Government for the deaths of the same three servicemen in the aforementioned crash. The only apparent difference in the pleadings is that in the instant action the plaintiffs allege the negligence of "certain of defendant's civilian, non-military agents, servants, and employees, to wit, members of the United States Federal Aviation Agency." (Complaint, par. 4)

DISCUSSION

It is submitted that the complaint in the instant case is subject to dismissal under the well known doctrine of *res judicata*. As the Third Circuit pointed out in *Anselmo v. Hardin*, 253 F. 2d 165 (C. A. 3, 1958):

A final judgment by a court of competent jurisdiction is *res judicata* as to the parties not only as to all matters litigated and determined by such judgment but also as to all relevant issues which could have been presented, but were not.

The doctrine applies to matters of jurisdiction as well as other issues and precludes further litigation of the same cause of action between the same parties. *American Surety Company v. Baldwin*, 287 U. S. 156 (1932). It has been held that the assertion of a different ground of relief will not avoid the bar of *res judicata*. *Miller v. National City Bank*, 166 F. 2d 723 (C. A. 3, 1948).

It is submitted that the plaintiffs herein have had their day in court. It was determined by this Court that they

Memorandum in Support of Motion to Dismiss.

could not maintain the action under the Federal Tort Claims Act by virtue of the Supreme Court's decision in the *Feres* case. The determination by the District Court was affirmed by the Court of Appeals and the Supreme Court declined to hear the case. As such plaintiffs have had a full and complete judicial determination of their alleged cause of action and have not prevailed. To allow them to maintain the instant action would be to condone circuitry and multiplicity of actions which is not favored in the law.

CONCLUSION

For the reasons stated above, plaintiffs' complaint should be dismissed with prejudice.

Respectfully submitted,

DREW J. T. O'KEEFE,
United States Attorney.

By: /s/ JOSEPH H. REITER,
Joseph H. Reiter,
Assistant United States Attorney.

Of Counsel:

JOHN F. MURRAY,
Department of Justice,
Washington, D. C.

**Memorandum in Opposition to Defendant's Motion
to Dismiss.**

IN THE
UNITED STATES DISTRICT COURT,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 42958

JOSEPH B. SHEPPARD, SR., Administrator of the Estate of
JOSEPH B. SHEPPARD, JR.; and ANTHONY G. MOCCIA, Ad-
ministrator of the Estates of WILLIAM BRADLEY BREON
and MICHAEL J. MONDO, JR.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Statement

On June 24, 1966, the present plaintiffs filed an action under the Tort Claims Act to recover for the death of three servicemen killed in the crash of an Air Force plane on June 25, 1965, in California. Defendant moved under Rule 12(b) to dismiss the complaint on the ground that "this Court lacks jurisdiction over the subject matter of this action and that the complaint fails to state a claim upon which relief can be granted."

On July 27, 1966, Judge Davis in a one sentence order granted defendant's motion on the ground that "plaintiffs' claims for relief are governed by *Feres v. United States*, 340 U. S. 135 (1950). On July 29, 1966, plaintiff appealed to the Court of Appeals, which on December 12, 1966, in a

*Memorandum in Opposition to Defendant's Motion
Motion to Dismiss.*

brief per curiam opinion (369 F. 2d 272) affirmed the dismissal "by the District Court under Rule 12b, F. R. Civ. P. for lack of jurisdiction over the subject matter." Certiorari was subsequently denied (386 U. S. 982).

The present action was commenced on June 15, 1967, seeking recovery for the same three deaths. However, whereas the prior action was based on the alleged negligence of members of the United States Air Force, the present action is based on the alleged negligence of civilian employees of the Government.

The United States has moved for dismissal on the ground of res judicata.

On December 15, 1966, the Central District of California overruled the government's motion to dismiss in *Lee v. United States*, 261 F. Supp. 252 (C. D. Cal. 1966), a death action by a serviceman arising out of the same plane crash involved in the instant case. In the *Lee* case the sole basis of the suit was the alleged negligence of the F.A.A., and the California District distinguished *Feres* on that ground. An appeal is pending before the Ninth Circuit in the *Lee* case. Plaintiffs' present action seeks to take advantage of the distinction established by the *Lee* case.

ARGUMENT

The prior action brought by these plaintiffs having been dismissed for want of jurisdiction was not a decision on the merits and is not a bar to a subsequent suit where sufficient jurisdictional facts are alleged. *Swift v. McPherson*, 232 U. S. 51, 58 L. Ed. 499 (1913); *Wade v. Rogals*, 270 F. 2d 280 (3rd Cir. 1959); *Heinter v. United States*, 283 F. 2d 874 (Ct. Claims 1960).

Moreover, where judgment in the former action is on a demurrer to the complaint, the bar of res judicata extends only to the exact point raised and does not operate as bar to a second action on a different theory. *Wiggins*

*Memorandum in Opposition to Defendant's Motion
Motion to Dismiss.*

Ferry Co. v. Ohio & Miss. R. Co., 142 U. S. 396, 410, 35 L. Ed. 1055, 1060-61 (1891). See *Miller v. National City Bank of N. Y.*, 66 F. 2d 723, 727 (2d Cir. 1948), cited by defendant, where the Court noted that the dismissal of an action on a demurrer for a defect apparent on the face of the complaint is not a bar to a second action where the defect is cured.

In the original action brought by the instant plaintiffs the allegation was that the negligence was committed by members of the armed forces. The Court held that action to be barred under the *Feres* case. The present action alleges the negligence only of civilian employees of the United States, an entirely different situation. See *Lee v. United States*, 261 F. Supp. 252 (C. D. Calif. 1966).

WHEREFORE, defendant's motion should be overruled.

STEPHEN M. FELDMAN
Attorney for Plaintiffs

S13

Order.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 42958

JOSEPH B. SHEPPARD, et al.

vs.

UNITED STATES OF AMERICA.

AND Now this 16th day of August, 1967, it appearing that the United States intends to move to dismiss the above captioned action on the ground of res judicata, and it further appearing that there is pending before the United States Court of Appeals for the Ninth Circuit an appeal in the case of Lee v. United States, the disposition of which will affect the disposition of the above captioned matter,

IT IS HEREBY ordered that all proceedings in the above captioned matter be stayed until a final determination has been made by the United States Court of Appeals for the Ninth Circuit in the case of Lee v. United States.

WEINER
U. S. D. J.

No. 21706

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

ARDELL LEE, ET AL.,

Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANT

EDWIN L. WEISL, Jr.,
Assistant Attorney General,

WILLIAM M. BYRNE, JR.,
United States Attorney,

MORTON HOLLANDER,
LEONARD SCHAITMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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WM. B. LUCK

DEC 21 1967

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21706

UNITED STATES OF AMERICA,

Appellant,

v.

ARDELL LEE, ET AL.,

Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANT

1. A substantial portion of appellees' brief (pp. 6, et
eq.) is devoted to arguments derived from the legislative
history of the Federal Tort Claims Act and language in Brooks v.
United States, 337 U.S. 49. However, similar arguments were made
o, and rejected by, the Supreme Court in Feres v. United States,
40 U.S. 135. The Supreme Court in Feres took into account the
considerations persuasive of liability" which appellees urge

here (340 U.S. at 138-139), but concluded:

that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service (340 U.S. at 146). 1/

Moreover, as stated in our main brief (pp. 12-13), Congress has acquiesced in the holding of Feres, permitting the decision to stand undisturbed for more than 17 years.

2. Although appellees correctly note that the Government's brief in Feres referred, in part, to considerations of military discipline (Appellees' Brief, pp. 9-10), the considerations underlying the Feres rule were stated at length in the Court's opinion. As stated in our main brief (pp. 7-8), the Court in Feres emphasized, inter alia, that the relationship existing between the United States and its military personnel is one "distinctively federal in character," and that the application of local law to that relationship, by virtue of the Tort Claims Act, would be completely inappropriate. 340 U.S. at 143-144. The Court also stressed that the Act "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable,

1/ Since appellees' complaint specifically alleged that the deaths involved here occurred while the decedents were "on active duty" in the United States Marine Corps (R. 2, 4), the district court correctly recognized that "the deaths of the two servicemen clearly were in the course of activity incident to their service with the Marine Corps" (R. 43). There is no basis in fact or law for appellees' contention (Appellees' Brief, pp. 2-3) that the deaths were not incurred "incident to service."

consistent and equitable whole" (340 U.S. at 139), and that it was thus highly relevant that Congress had already provided "system of simple, certain, and uniform compensation for injuries or death of those in armed services." 340 U.S. at 144.

Moreover, as noted in our main brief (p. 10, fn. 3), in Feres, itself, the threat to military discipline was far less direct than it is here. The three cases decided in Feres involved a sleeping soldier (Feres) who died due to alleged negligence in maintaining a defective heating plant and failing to maintain an adequate fire watch, and two other soldiers (Jefferson and Griggs) who were injured by alleged medical malpractice occurring while they were relieved from military assignments and duties and on sick or hospital leave from those duties. The necessity of maintaining discipline while soldiers are sleeping, or on operating tables, is far less clear than the necessity of maintaining discipline among soldiers being shipped to Viet Nam in military aircraft under the control of military authorities.

3. Contrary to appellees' contentions (Appellees' Brief, pp. 10-13), it is clear, as stated in our main brief (pp. 8-12), that the Supreme Court never has deviated from the rule of Feres: that the right to maintain a Tort Claims Act suit based on injuries incurred by a serviceman depends upon whether the injuries were incurred "incident to service." Thus, in United

States v. Brown, 348 U.S. 110, 113, the Supreme Court expressly said:

We adhere * * * to the line drawn in the Feres case between injuries that did and injuries that did not arise out of or in the course of military duty.

And in United States v. Muniz, 374 U.S. 150, 159, the Supreme Court reiterated that it found "no occasion to question" the holding in Feres. See, also, Indian Towing Co. v. United States, 350 U.S. 61, 69.

Moreover, as stated in our main brief (p. 11), the Supreme Court has confirmed the viability of Feres by its consistent application of its rationale in workmen's compensation statutes: "practically always thought of as substitutes for, not supplements to, common-law tort actions." United States v. Demko, 385 U.S. 149, 151.

4. Notwithstanding appellees' contentions (Appellees' Brief, pp. 14-19), as stated in our main brief (pp. 13-17), the courts of appeals have consistently applied the Feres rule in all cases involving injuries "incident to service," regardless of the lack of an "official military relationship" between the claimant and the alleged tortfeasor, or of an immediate threat to military discipline.

a. As our main brief demonstrates (pp. 13-14), this Court's decision in Callaway v. Garber, 289 F. 2d 171, certiorari denied, 368 U.S. 874, is completely controlling here. Although the appellees assert that the explanation of Feres offered in

Brown does apply to the facts of Callaway (Appellees' Brief, pp. 14-15), this Court in Callaway expressed a contrary view, stating that "[t]he instant case can find no shelter within those reasons * * *." 289 F. 2d at 173-174.^{2/} The reason why this Court in Callaway held that the Tort Claims Act suit could not be maintained was that "the instant case does fall within the rule of the Feres case as promulgated, and we must adhere to said rule since it was in no way negated or modified by the later Brown case." Id., at 174.

Appellees also contend (Appellees' Brief, p. 15) that Callaway should be "examined further" in the light of United States v. Muniz, 374 U.S. 150. However, as noted in our main brief (pp. 11, 14), the Supreme Court in United States v. Demko, 385 U.S. 149, 153, explained that Muniz merely held that federal prisoners could sue the Government in tort since "neither of the two prisoners * * * was covered by the prison compensation law." And, in Muniz, the Supreme Court expressly noted that it found "no occasion to question" the holding in Feres.^{3/} 374 U.S. at 159.

^{2/} The fact that the tortfeasor in Callaway might be subject to the scrutiny of his superiors (Appellees' Brief, p. 15) is clearly unrelated to the "discipline" problem to which the Supreme Court had reference in Brown-viz., the scrutiny by a court of a superior officer's judgment at the behest of one under his command.

^{3/} As we pointed out in our main brief (p. 14, fn. 7), a decision of this Court rendered subsequent to Muniz is in accord with Callaway v. Garber, supra. Appellees attempt to distinguish this subsequent decision -- United Air Lines, Inc. v. Wiener, 335 F. 2d 379, 396-398, 402, 404, petition for a writ (Continued)

b. The appellees assert that "the sole question" considered in Layne v. United States, 295 F. 2d 433 (C.A. 7), certiorari denied, 368 U.S. 990, was "whether decedent was on active duty with the federal government" (Appellees' Brief, pp. 17-18). However, as our main brief states (p. 14), the plaintiff in Layne specifically contended that her suit was not barred by Feres because the alleged negligence was that of civilian control tower operators rather than of other military personnel (Brief of Plaintiff-Appellant, pp. 5, 11, 32-34, 37; Reply Brief of Plaintiff-Appellant, pp. 2-3, 6-9). The court of appeals found this and other arguments of the plaintiff to be "lacking in merit," and dismissed the suit on the ground that the death occurred "as an incident to military service" (295 F. 2d at 436).

c. Appellees state that the court in Sheppard v. United States, 369 F. 2d 272 (C.A. 3), certiorari denied, 386 U.S. 982 was not presented with the question of "the military relationship issue of a serviceman vis-a-vis a civilian or an F.A.A. employee of the Government" (Appellees' Brief, p. 17).

(Footnote 3 Continued) of certiorari dismissed, 379 U.S. 951 -- on the ground that "[n]o action was commenced against the Government by the estates of the servicemen-passengers" (Appellees' Brief, p. 18, fn. 9). However, the estates of the servicemen-passengers did sue United Air Lines, which in turn sought indemnity from the United States. Even though the Government's liability was predicated, in part, upon negligence of employees of the Civil Aeronautics Administration, the United States successfully urged, as a defense to the indemnity claim, that "the government is not liable under the Federal Tort Claim Act for injuries to servicemen where injuries arise out of or are in the course of activity incident to service." 335 F. 2d at 404.

However, as we pointed out in our main brief (p. 15), the plaintiffs in Sheppard specifically argued, not only that subsequent Supreme Court decisions had "destroyed the validity" of Feres, but that, in any event, Feres should be limited to situations that "pose a threat to military discipline." ^{4/} Both of these

4/ Thus, plaintiffs in Sheppard urged:

Assuming, for purposes of argument, that there is still some vitality in Feres, the Supreme Court has limited the rationale of that case to situations where there is a possibility of interfering with military discipline, and Feres, therefore, should be applied only in situations where a right of recovery would pose a threat to military discipline. * * *

* * * * *

A more workable distinction between cases where servicemen may and may not collect, which is more in conformity with the rationale of Feres and the language of the Act and which would be in terms familiar to the law of torts, is as follows: If the "peculiar and special relationship of the soldier to his superiors" is not merely a passive background or circumstance to the accident but is instead a proximate or legal cause of the accident, the serviceman may not collect under the Tort Claims Act (Brief of Appellants, pp. 21, 27).

And the Sheppard plaintiffs also urged:

In the present case, the relationship of the decedents to the Government, insofar as is relevant to the happening of the accident, was not the "peculiar and special relationship of the soldier to his superiors," but rather the common relationship of airplane passengers to airplane operator. Their status as marines was merely a passive background or circumstance to the accident and was not the legal cause of the accident.
(Continued)

contentions, which are basically identical to those accepted by the court below and urged here by the appellees, were unequivocally rejected by the Third Circuit in Sheppard, 369 F. 2d at 272. ^{5/}

(Footnote 4 Continued)

Although decedents were no doubt subject to military orders from the crew of the aircraft, such orders would be no different from the normal orders a commercial airline crew would give to its passengers such as "fasten seat belts" and "no smoking." And the ground crews whose negligence in maintaining the aircraft is a partial basis for the present action would have had no contact with decedents at all.

It is inconceivable that knowledge by the decedents that they or their estates would have a right of action against the Government in the event of a plane crash would lead to breaches of discipline. And it is equally inconceivable that knowledge by the flight crew or ground crews that the military passengers on the plane could sue in the event that they negligently caused a crash would in any way interfere with the performance of their duties. * * * (Brief of Appellants, pp. 28-29).

^{5/} Appellees' discussion (Appellees' Brief, pp. 14-19) of other court of appeals cases cited in our main brief (p. 16, fn. 11) simply ignores the import of those decisions.

Appellees cite two decisions in support of their claims (Appellees' Brief, pp. 5, 13): Ingham v. United States, 373 F. 2d 227 (C.A. 2), certiorari denied, ___ U.S. ___; and United States v. Furumizo, 381 F. 2d 965 (C.A. 9). Neither of these cases involved the claims of servicemen and neither contains any reference to the Feres rule.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our main brief, the district court's order should be reversed and judgment entered in favor of the appellant dismissing the complaint.

Respectfully submitted,

EDWIN L. WEISL, Jr.,
Assistant Attorney General,

WILLIAM M. BYRNE, JR.,
United States Attorney,

MORTON HOLLANDER,
LEONARD SCHAITMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

DECEMBER 1967.

CERTIFICATE

I certify that, in connection with the preparation of this reply brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply brief for the appellant is in full compliance with those rules.

Leonard Schaitman
LEONARD SCHAITMAN
Attorney for Appellant,
Department of Justice,
Washington, D. C. 20530.

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA }

CITY OF WASHINGTON }

ss.

LEONARD SCHAITMAN, being duly sworn, deposes and says:

That on December 19, 1967, he caused three copies of the foregoing Reply Brief for the Appellant to be served by air mail, postage prepaid, upon counsel for appellees:

Samuel M. Hecsh, Esquire
110 West "C" Street
San Diego, California 92101

Messrs. Kreindler and Kreindler
99 Park Avenue
New York, New York 10016

Leonard Schaitman

LEONARD SCHAITMAN
Attorney for Appellant,
Department of Justice,
Washington, D. C. 20530.

Subscribed and Sworn to before
me this 19th day of December, 1967.
[Seal]

Angeline Johns

NOTARY PUBLIC

My commission expires on April 14, 1972.

NO. 21708

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE MONROE HAVEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

ARNOLD G. REGARDIE,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

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WM. B. LUCK, CLERK

Attorneys for Appellee,
United States of America.

NO. 21708
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE MONROE HAVEN,

Appellant,

vs.

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United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

ARNOLD G. REGARDIE,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE MONROE HAVEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant Lawrence Monroe Haven was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on October 26, 1966, in Case No. 36769-CD [C. T. 2-3]. ^{1/} The Indictment charged a violation of Title 50 Appendix, United States Code, Section 462, Universal Military Training and Service Act; Failure to Report for Employment.

The appellant was arraigned on November 14, 1966, before

1/ "C. T. " refers to Clerk's Transcript of Record.

the Honorable Jesse W. Curtis, United States District Judge and entered a plea of not guilty. The appellant waived his right to counsel at this time [C. T. 11]. On December 20, 1966, counsel was appointed for appellant [C. T. 25]. On December 23, 1966, case number 36769 was called for court trial before the Honorable A. Andrew Hauk, United States District Judge. The case was subsequently continued to January 13, 1967 [C. T. 29]. On January 13, 1967, the appellant was found guilty by the court [C. T. 39] and on February 6, 1967, appellant was sentenced to the custody of the Attorney General for a term of three years [C. T. 36]. A timely notice of appeal was filed on February 7, 1967 [C. T. 45] and appellant was released on bond pending appeal.

Jurisdiction of the trial court was founded upon Title 50, Appendix, United States Code, Section 462, Title 18, United States Code, Section 3231 and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294, and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTES INVOLVED

Title 50, Appendix, Section 462, United States Code, provides in pertinent part as follows:

"Any member of the Selective Service System

or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000,⁹ or by both. . . ."

Title 50 Appendix, Section 456(j) states:

"(j) Conscientious objectors, -- Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from

any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in Section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of Section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title."

Title 32, Code of Federal Regulations, Part 1660, provides in pertinent part as follows:

"1660.20 - Determination of type of civilian work to be performed and order by the Local Board

to perform such work.

"(a) . . . a registrant . . . shall submit to the Local Board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in Section 1660.1, which he is qualified to do and which he offers to perform in lieu of induction into the armed forces

"(b) If the registrant fails to submit to the Local Board types of work which he offers to perform, . . . the Local Board shall submit to the registrant by letter three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in Section 1660.1 which it deems appropriate for the registrant to perform in lieu of induction

"(c) If the Local Board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the state in which the Local Board is located or the representative of such State Director, appointed by him for that purpose, shall meet with the Local Board and the registrant and offer his assistance in reaching an agreement

"(d) If, after the meeting referred to in paragraph (c) of this section, the Local Board and

registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the Local Board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in Section 1660.1 which is deemed appropriate,"

Title 32 C. F. R. §1641.2(b) provides:

"If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege."

III

STATEMENT OF THE FACTS

At the time of the trial of this case a photographic copy of the Official Selective Service System file for appellant was offered and admitted into evidence as Government's Exhibit No. 1 [R. T. 27]. ^{2/} This copy had attached to it a certificate by Captain T. D. Profitt, U. S. A. F. (Ret.), District Coordinator, Selective Service System, that it was a full, true and correct copy of the original

^{2/} "R. T." refers to Reporter's Transcript of Record.

file of which he had legal custody. Also attached was a certificate and seal of Major (now Colonel) Malcolm F. Miller, Staff Secretary, Headquarters Southern Area, Selective Service System, to the effect that Captain Profitt was the District Coordinator and had custody of the original Selective Service file of the appellant.

This file revealed the following events with respect to appellant's status with the Selective Service System:

On September 28, 1960 appellant registered with Local Board No. 137, Riverside, California [pp. 1-2]. ^{3/}

Appellant was assigned the following classifications on the designated dates by Local Board No. 137 (hereinafter referred to as the "Board"):

October 7, 1963 - 1-A

March 4, 1964 - 1-A

July 1, 1964 - 1-A

October 28, 1965 - 1-O

On August 30, 1963, the Board received a completed Classification Questionnaire (SSS 100) from appellant. Appellant did not complete Series VII relating to Ministers or students preparing for the Ministry but he did sign Series VIII relating to Conscientious Objectors [pp. 4-8].

On September 17, 1963 a completed Special Form For Conscientious Objector (SSS 150) was received by the Board from appellant [pp. 15-19].

^{3/} Refers to pages of appellant's Selective Service File, (Government's Exhibit No. 1).

On October 7, 1963 appellant was classified in Class 1-A and notice of such classification was sent to appellant [p. 11].

On December 10, 1963, the Board received from appellant a completed Current Information Questionnaire (SSS 127) [pp. 20-22].

On March 4, 1964 appellant was classified in Class 1-A and notice of such classification was sent to appellant [p. 11].

On March 24, 1964 appellant was ordered to report for an Armed Forces Physical Examination on April 16, 1964 [pp. 11, 23].

On May 4, 1964 a Statement of Acceptability (DD 62) was mailed to appellant [pp. 11, 36].

On July 1, 1964 appellant appeared before the Board for an interview. He stated inter alia that he had not appealed his classification because he had heard from other people that it would do no good, that others have just gone to prison. He stated that he had really not done much religious work as he had not completed enough hours but that now he considered himself a minister. Appellant stated that he would not work for the Government in any way [p. 38].

On July 1, 1964 appellant was classified in Class 1-A and notice of such classification was mailed to him [p. 11].

On October 28, 1964, after inquiry and recommendation by the Department of Justice, appellant was classified in Class 1-O by the Appeal Board and on November 3, 1965, notice of such classification (SSS 110) was mailed to him [p. 11].

On November 23, 1965, a Special Report For Class 1-O



Registrants (SSS 152) was mailed to appellant and was returned incomplete on December 6, 1966 [pp. 11, 54-57].

On January 23, 1966, the Board sent appellant a letter suggestion three types of civilian work in lieu of induction. On February 7, 1966, this letter was returned to the Board with appellant indicating that he did not wish to perform any of the types of work suggested by the Board [pp. 11, 60, 61].

On March 8, 1966, appellant appeared before the Board for an interview in order to reach an agreement on a type of work to be performed by him in lieu of induction. Appellant advised that he was not a pioneer minister. He also indicated that he refused to accept any type of work of material importance in lieu of induction into the Armed Forces. The Board determined that work as an institutional helper, Los Angeles County Department of Charities, was available and this work was appropriate to be performed by appellant [pp. 12, 65, 66, 67].

On April 11, 1966 appellant was ordered by the Board to report to the Board on April 25, 1966 to receive instructions to report for civilian work [p. 12].

On April 25, 1966 appellant reported to the Board and was instructed to report to the Los Angeles Department of Charities not later than April 26, 1966. Appellant stated that he did not intend to report as ordered [pp. 12, 72, 73].

On May 11, 1966, the Board received a Statement of Employer (SSS 153) indicating that appellant did not report as ordered and had not reported to the Los Angeles County Department of Charities as



ordered [pp. 12, 74].

IV

QUESTIONS RAISED ON APPEAL

I Did the trial court err in admitting in evidence the Selective Service System file of the appellant?

II Did the trial court err in failing to appoint counsel for appellant at an earlier stage in his defense?

III Did the trial court err in not requiring the Government to put into evidence facts and figures relating to the religious composition of local draft boards?

V

ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE THE CERTIFIED PHOTOGRAPHIC COPY OF THE APPELLANT'S OFFICIAL SELECTIVE SERVICE FILE.

Rule 44(a), Federal Rules of Civil Procedure, provides that an official record or an entry therein, when admissible for any purpose, may be evidenced by a copy attested by the officer having legal custody of the record, and accompanied with a certificate that such office in which the record is kept is within the United States. The certificate may be made by any public officer having a seal of office and having official duties in the political subdivision in which



the record is kept, authenticated by the seal of his office.

Title 28, United States Code, Section 1733, provides that records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction, or occurrence as a memorandum of which the same were made or kept. Section 1733 also provides that properly authenticated copies of any books, records, papers, or documents of any department or agency of the United States shall be admitted into evidence equally with the originals thereof.

Rule 27, Federal Rules of Criminal Procedure, provides that an official record or any entry therein may be proved in the same manner as in civil actions.

Appellant contends that the trial court erred by admitting into evidence a bound photographic copy of his original selective service file. This document had been attested and certified in compliance with the above mentioned rules of procedure (See Government's Exhibit No. 1).

Appellant alleges that the introduction of this document violated the best evidence rule and was hearsay (Appellant's Brief, p. 4, lines 20-21). He cites, however, no case law to support his unique interpretation of Rule 44(a), Federal Rules of Civil Procedure, and Section 1733, United States Code, Title 28, nor does he specify what portion of these statutes make the certified copy of appellant's selective service file inadmissible.

This Circuit has previously approved the proposition that a duly authenticated copy of the registrant's selective service file is

inadmissible in a prosecution for violation of Title 50 Appendix, United States Code, Section 462.

LaPorte v. United States, 300 F.2d 878

(9th Cir. 1962);

Yaich v. United States, 283 F.2d 613

(9th Cir. 1960);

Kariakin v. United States, 261 F.2d 263

(9th Cir. 1958);

Olender v. United States, 210 F.2d 795

(9th Cir. 1954).

See also:

United States v. Borisuk, 206 F.2d 338

(3rd Cir. 1953);

United States v. Parrott, 370 F.2d 388

(9th Cir. 1966).

Besides failing to support with legal authority the alleged error in introducing appellant's Selective Service File, appellant continues with an argument that is not relevant to this issue. Appellant points out that placing his Selective Service file into evidence precluded him from questioning the local board as to his 1-A classification [Appellant's Brief, p. 4]. Appellant was classified as 1-O on October 28, 1964 (See Statement of Facts, supra, p. 8). Thus, any argument as to his 1-A classification is immaterial.

Appellant cites Falbo v. United States, 320 U.S. 549 (1944) for the proposition that "a person was required to use all of his administrative remedies before being able to proceed in a court."

(Appellant's Brief, p. 4, lines 23-26). This is immediately preceded by the allegation that "[t]he Government is attempting to use the file of appellant as a sword rather than a shield." There is no apparent connection between the two statements and their relevancy to appellant's contention that the introduction of the Selective Service file was erroneous is at best questionable. Falbo, supra, dealt with the question of whether Congress had authorized judicial review of the propriety of a board's classification and did not touch on the question of admissibility of the Selective Service file.

B. THE TRIAL COURT DID NOT ERR IN FAILING TO APPOINT COUNSEL FOR DEFENDANT AT AN EARLIER STAGE IN HIS DEFENSE.

Appellant's argument does not support the error alleged. Appellant's Brief, p. 6, lines 4-19, contains a summary of appellant's purported progress within the ranks of the Jehovah's Witnesses and a claim of appellant's readiness to do charitable work of his own volition (Appellant's Brief, p. 6, lines 20-25). This is in no way relevant to a claimed denial of counsel at an earlier stage of the proceedings.

Assuming arguendo that appellant's citations of Miranda v. Arizona, 384 U.S. 436 (1966) and Escobedo v. Illinois, 378 U.S. 478 (1964) [Appellant's Brief, p. 5, lines 3-4] were meant to support his alleged claim of error in not appointing counsel at an earlier stage of the proceedings, appellant's contention nevertheless must

fall.

In the first place, appellant's specification of error is not precise because he does not point to which stage counsel should have been appointed.

Secondly, it is to be noted that appellant waived right to counsel at his arraignment on November 14, 1966 [C. T. 11]. Appellant also waived right to counsel when interviewed by the F. B. I. on October 12, 1966 [R. T. 29-30].

Thirdly, if it is to be assumed that appellant is claiming that counsel should have been appointed during appellant's processing before his local board, he has cited no legal authority in support thereof. Citations of Miranda, supra, and Escobedo, supra, appearing on page 5 of Appellant's Brief fall far short of this mark. In actuality, appellant is not legally entitled to counsel when appearing before the board as explained below.

The right to assistance of counsel is provided for and regulated by the Constitution of the United States, federal statutes 4/ and the Rules of Criminal Procedure.

The Sixth Amendment to the Constitution of the United States provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." (Emphasis added)

The Rules of Criminal Procedure provide as follows:

"Every defendant who is unable to obtain

4/ See e. g., 18 U. S. C. §3005 Counsel and Witnesses in Capital Cases.

counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment. " 5/

The Sixth Amendment applies only to trial in the Federal courts.

Betts v. Brady, 316 U.S. 455, 461 (1942)

and cases there cited.

The right to assistance of counsel does not exist in civil proceedings.

"The absence of a constitutional right to counsel in administrative proceedings under the Selective Service Act has been emphatically and frequently upheld, usually on the ground that these proceedings are in truth administrative and are not criminal proceedings."

United States v. Wierzchucki, 248 F. Supp. 788, 790

(D. C. W. D. Wis. 1965).

In the Administrative Procedure Act, Congress has provided that anyone compelled to appear before an agency of the Government is entitled to appear in person or with counsel or other qualified representative.

5/ Federal Rules of Criminal Procedure, Rule 44(a), 18 U. S. C. A.

Title 5, U. S. C. §555(b).

However, the entire administrative process under the Selective Service Act has been expressly removed from the application of the Administrative Procedures Act.

Title 50, U. S. C. App. §463(b).

Furthermore, the regulations governing the administration of the Selective Service System expressly provide " . . . [t]hat no registrant may be represented before the local board by anyone acting as his attorney or legal counsel. "

Title 32 C. F. R. , Chap. XVI, Part 1624. 1(b).

C. THERE IS NO EVIDENCE IN THE RECORD
TO SUPPORT APPELLANT'S ALLEGATION
OF A SYSTEMATIC EXCLUSION OF JEHO-
VAH'S WITNESSES FROM SERVICE ON
LOCAL DRAFT BOARDS.

The general rule in criminal cases is that the accused is presumed innocent until his guilt is established by the prosecution beyond all reasonable doubt. However, if the accused sets up distinct substantive matter to exempt him from punishment he has the burden of proof in such matters.

20 Am. Jur. Evidence §134.

As pointed out by Colonel Miller during the course of the trial, the composition of the local boards is controlled by law [R. T. 108-111]. Religious belief is not included among the criteria for selection. The regulations governing the Selective Service System provide as follows:

"(a) A local board of three or more members shall be appointed for each local board area by the President upon recommendation by the Governor.

"(b) A local board of three or more members, with at least one member from each county included within the intercounty local board area, shall be appointed for each intercounty local board area by the President upon recommendation of the Governor.

"(c) The members of the local boards shall be male citizens of the United States who shall be residents of a county in which their local board has jurisdiction and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction. No member of a local board shall be a member of the armed forces or any reserve component thereof. Members of local boards shall be at least thirty years of age. "

Title 32 C.F.R. Chap. XVI, §1604.52.

The regulations also provide that:

"In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each such registrant shall receive equal justice. "

Title 32 C.F.R. , Chap. XVI §1622.1(d).

"It is the settled general rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and that where the contrary is asserted it must be affirmatively shown."

(Emphasis added)

Lewis v. United States, 279 U.S. 63, 73 (1929);

Keene v. United States, 266 F.2d 378, 380

(10th Cir. 1959).

Appellant in the Keene case, supra, alleged a failure on the part of the Government to prove the indispensable factum of a quorum of appellant's draft board when his 1-A classification was determined. The court indulged in the traditional presumption of regularity and validity of board actions and concluded that although the appellant had raised the question of the competency of the board, ". . . it offered no proof whatsoever that it was illegally or improperly constituted when it classified him." Keene v. United States, supra, at p. 381.

Similarly, here, appellant has raised a question as to the religious composition of the board, alleging a violation of due process in that he has been a victim of discrimination because no member of the Jehovah's Witnesses had ever been asked to serve on a local board (Appellant's Brief, pp. 7-8). However, he adduced no proof in support of this claim. Appellant claims that one of his witnesses, Melvin Sargent (an overseer of the East Los Angeles congregation of Jehovah's Witnesses, R. T. 56, lines 24, 25, and a member of Jehovah's Witnesses for fifty-four years, R. T. 58, line 25) said

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that no member of Jehovah's Witnesses has ever been asked to serve on a local draft board (Appellant's Brief, p. 7, lines 18-20). The transcript of the trial shows that the question was whether any member of his congregation had ever been asked to serve on a local board [R. T. 57, lines 21-23] (Emphasis added). This witness further admitted not having talked to other congregations and not having talked to other Jehovah's Witnesses about it [R. T. 58, lines 6-12], and not having checked throughout the country [R. T. 69, lines 3-5]. He said that some Jehovah's Witnesses as far as he knew might be serving on local boards [R. T. 69, lines 10-13]. Mr. Sargent also stated that he would not serve on a local board if asked [R. T. 74, lines 4-12; 76, lines 10-16], that he would not take the Oath of Office required of members of a local board [R. T. 76, lines 10-16] and that he had never heard of a Jehovah's Witness that had actually taken the oath [R. T. 77, lines 2-4].

Appellant further claims that he personally contacted seven other congregations from Los Angeles to Indio and that no member within that group had been asked to serve on a local board (Appellant's Brief, p. 7, lines 21-24). Actually, he contacted only seven people, one person from each congregation [R. T. 87, lines 14-19]. Appellant admitted that it would be a compromise of his position to serve on a local board [R. T. 91, lines 17-22; 101, lines 8-12].

Appellant urges that no satisfactory explanation was made to the court for the failure of the Marshal to produce the necessary witnesses for his defense. In fact, there was only one witness in issue, William Jackson from Jehovah's Witness National

Headquarters in New York, and as appellant concedes, the witness secreted himself (Appellant's Brief, p. 7, lines 9-12). Far from being unsatisfied with the Marshal's explanation of his failure to serve the witness in question, the court was convinced that the witness had evaded service [R. T. 11, lines 9-12; 14, lines 11-15; 22, lines 4-6, 9-14, 20-24; 23, lines 2-23; 24, lines 4-25; 46, lines 15-25; 47, lines 5-9]. Note that the court even signed his Order that the witness had evaded service [C. T. 27; R. T. 24, lines 4-25]. The record further indicates that all national officers of the Jehovah's Witnesses were in South America on a series of assemblies for the whole month of January [R. T. 80, lines 12-18]. Therefore, it can hardly be concluded that the Marshal was at fault in failing to produce the necessary witnesses.

Far from creating a " . . . 'factual vacuum' which only the Government could step in and fulfill," the testimony elicited during the trial, as reviewed above, clearly shows that appellant has not established any prima facie case of discrimination against him. Even if appellant's secretive witness, William Jackson, had testified, it is questionable as to what he could have proved since appellant's counsel informed the court that Mr. Jackson had told him that he (Mr. Jackson) had no record through their headquarters that any Jehovah's Witness had ever served on a draft board [R. T. 8, lines 9-11]. Furthermore, it is doubtful that the proposition advanced by appellant is capable of proof since no inquiry as to religious belief is made of any board member [R. T. 110, lines 13-19], and Title 32, C.F.R. Chap. XVI, §1604.52, supra, p. 16].

Lastly, it should be pointed out that appellant at no time until he came into court made any charge of prejudice or discrimination by the board, either against him or against Jehovah's Witnesses in general. Appellant cannot therefore for the first time at his trial charge arbitrariness or prejudice to his local board.

United States v. Phillips, 143 F. Supp. 496, 503

(N. D. W. Va. 1956); aff'd per curiam,

239 F.2d 148 (4th Cir. 1956);

United States v. Jackson, 369 F.2d 936, 939

(4th Cir. 1966).

CONCLUSION

For the reasons stated, the decision of the trial court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

ARNOLD G. REGARDIE,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Arnold G. Regardie
ARNOLD G. REGARDIE

No. 21709 ✓

In the
UNITED STATES COURT OF APPEALS
For the Ninth Circuit

WILLIAM WARDEN DUNCAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

Lewis Roca Beauchamp & Linton

By John J. Flynn
Robert A. Jensen

114 West Adams Street
Phoenix, Arizona 85003

Attorneys for Appellant

JUN 13 1967

FILED

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WM. B. LUCK, CLERK

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No. 21709

In the
UNITED STATES COURT OF APPEALS
For the Ninth Circuit

WILLIAM WARDEN DUNCAN,)
)
Appellant,)
)
VS.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)

Brief of Appellant

JURISDICTION

Appellant William Warden Duncan was convicted on two counts of violation of Title 18 U.S.C. Sec. 2313 (R. 1-2). Judgment was entered on January 9, 1967. Notice of appeal was duly filed (R. 29) and the matter brought here under 28 U.S.C. Sec. 1291. The appellant was sentenced to five

*In accordance with the Rules, we have brought up the record by photocopy and the transcript by typescript. The transcript of the trial was produced by the reporter below in one volume which will be identified here as "T." The record itself will be identified by the letter "R." A transcript taken at the pre-trial will be identified as "P.T."

years and fined \$500 on each count, the sentences to run concurrently (R. 28).

STATEMENT OF THE CASE

A. Introduction.

This case involves the alleged receiving and concealing of two stolen motor vehicles moving in interstate commerce from Los Angeles, California to Phoenix, Arizona. The vehicles, a 1961 Chevrolet Impala and a 1964 Chevrolet Impala Supersport, were allegedly received and concealed on September 11, 1965 and October 18, 1965, respectively. The appellant and another, Judson Wesley Rainey, were charged with the offenses. The appellant's motion for separate trial (R. 21-22) was granted and his case proceeded to trial first.

B. Pre-trial Motion for Bill of Particulars.

On October 6, 1966 the defendant filed a motion for bill of particulars, twenty-two in number, (R. 9-11) requesting certain basic information regarding the facts and circumstances of the charges. Among the particulars inquired of was from whom and where the cars had been received, where they were concealed, whether either of the defendants drove the cars, and the pertinent dates of these activities. (For the convenience of the Court the entire bill of particulars is attached as an appendix). The motion

was denied as to all twenty-two of the particulars; the government in its response to particulars number 21 and 22 stated that it knew of no material evidence favorable to the defendant. After denying the motion, the court suggested that counsel informally confer with a view towards the government making more information available to the defendant. As a result of this conference, the following information was made available to the defendant (R. 19-20): the place of receipt and concealment of the automobiles (Phoenix, Arizona) and the serial number, owner and color of each of the vehicles.

Maintaining that they were unable to learn even basic information from a defendant who steadfastly maintained his innocence, defense counsel at the pre-trial conference on December 8, 1966, five days before trial, asserted that they were unable because of lack of specificity to develop the defense of alibi or otherwise prepare an adequate defense (P.T. 2-3). Both defendants then offered to open their files upon the government doing likewise in accordance with Rule 17.1, Federal Rules of Criminal Procedure, and the suggestions of the Committee on Pre-trial Procedure as set forth in 37 F.R.D. 95 (1965). The government refused (P.T. 5). The defendant then proceeded to trial knowing absolutely nothing other than the minimal information

contained in the indictment, the serial number, owner and color of the vehicles, and the alleged place of receipt and concealment.

C. The Evidence.

Although nine persons testified for the government, essentially the defendant was convicted on the testimony of one person, Robert Menz, a convicted felon whose crimes included filing a false claim with the United States government (T. 48). The prosecution's first witness, Penny Moyers, simply established the ownership of the 1961 Chevrolet Impala in a California used car dealer on September 9, 1965 (T. 19); the next witness, Rollis Boggs, likewise established ownership of the 1964 Chevrolet Impala Supersport in a California automobile dealer as of October 15, 1965 (T. 22).

Robert Menz testified that he had stolen and transported the 1961 Chevrolet Impala to Phoenix following a telephone call to the defendant (T. 32). Upon arrival, Menz, upon instructions, delivered the car to a Club Lido where Menz was met by the defendant and Judson Rainey (T. 35). The defendant and Rainey, unaccompanied by Menz, then went outside and examined the car (T. 35) and Menz was directed to deliver it to another bar where he received a "commission" from Duncan (T. 36). Menz then returned to California without

further incident (T. 36). At no time was the defendant physically placed in either of the cars by the witness Menz (T. 55, 57) or, indeed, by anyone else.

Menz allegedly delivered on or about October 15, 1965, the 1964 Chevrolet again following a call to Duncan (T. 37-38) who supposedly expressed an interest in such an automobile. The car was again driven by Menz to the Club Lido (T. 42) where Menz was met by the defendant and Rainey and the car was then transported by Menz to another bar (T. 42); the defendant allegedly again paid Menz a commission (T. 43). Two months later the defendant and Menz conversed in Phoenix regarding the fact that the Federal Bureau of Investigation had picked up both automobiles (T. 47-48). At the time he testified, Menz was incarcerated (T. 49) for the theft of another vehicle; he was never charged with the theft of the two cars supposedly received by the defendants (T. 49).

Beverly Harrell, the next witness, testified that in the "early fall" of 1965, while staying at the Duncan home, she on one occasion used a white Chevrolet of undetermined vintage--1960, 1961 or 1962 (T. 63, 64, 67). Mrs. Harrell testified that the car she drove could be operated without a key (T. 65). A motion to strike her testimony, as without proper foundation and identification

of the vehicle in question, was denied (T. 65) as was the earlier objection to lack of proper foundation (T. 63). The motion to strike was renewed at the end of the government's case and again denied (T. 109-110).

Ruby Lowry of the Arizona State Highway Department testified that she had searched the department's records for the year 1965 without finding a registration for either car in the defendant's name (T. 69). Vernon Hurst testified that upon his return from San Diego he found the two cars at his body shop (T. 72); he at no time connected the defendant Duncan to either of the cars (T. 81). Yvonne Hurst likewise in no way connected the defendant Duncan to the case, though testifying that Rainey had brought the two cars to her house and that they had been kept there for several weeks (T. 87). Daniel Barker, a Phoenix Police Officer, and Kenneth Pless of the F.B.I. likewise in no way tied the vehicles to the defendant Duncan. In summary, only two witnesses ever connected the appellant to the 1961 automobile, Menz and Beverly Harrell, and only one witness, Menz, tied the defendant in any way to the 1964 automobile.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. Sec. 2313:

"Whoever receives, conceals, stores, barter, sells, or disposes of any motor vehicle or aircraft, moving as, or which

is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

SPECIFICATIONS OF ERROR

1. The court below erred in refusing to grant appellant's motion for a bill of particulars for the reason that without the requested basic information the defendant was not apprised of "the nature and cause of the accusation" against him as required by the Sixth Amendment.

2. The court below erred in refusing to strike the testimony of Beverly Harrell for the reason that it was vague and uncertain and no proper foundation for her testimony regarding the 1961 automobile was ever established; at trial the testimony was specifically objected to as not material without further foundation (T. 63), not connected to the issues in the case (T. 65), immaterial (T. 109) and irrelevant (T. 109); the substance of the testimony was that in the "early fall" of 1965 the witness drove a

white Chevrolet of uncertain vintage, 1960, 1961 or 1962 (T. 63, 67).

QUESTIONS PRESENTED

1. Should a defendant, who has moved in timely fashion for more information, have to stand trial knowing as to the nature and cause of the accusation only the information provided by a bare bones indictment particularly when defense counsel has offered to open their files to the government?

2. Can a defendant be lawfully convicted of receipt and concealment of a 1961 vehicle in part on testimony that establishes only that the defendant allowed the witness on one occasion to use an automobile of the same color and make, both extremely common, though the witness cannot state the age of the car she drove or any other distinguishing feature?

SUMMARY OF ARGUMENT

The first issue presented by this case is whether, consistent with due process and the specific mandates of the Sixth Amendment, a defendant can be compelled to stand trial equipped essentially only with the knowledge provided by the form pleading. While the indictment in the instant case undoubtedly would have withstood a motion to quash, it was not sufficiently detailed to warrant the denial of the

defendant's motion for a bill of particulars (R. 9-11). The various courts of appeals have uniformly held in an analogous situation that a motion for a bill of particulars is the appropriate way to "flesh out" the pleading skeleton. In the instant case, the trial court abused its discretion in not requiring the prosecution to make available to the defendant basic facts concerning the charges. It is no answer, under our cherished system, to argue that the defendant must know these facts; as pointed out by Judge (later Justice) Whittaker in United States v. Smith, 16 F.R.D. 372 (W.D. Mo. 1954), a classic discussion, this argument presumes the defendant guilty rather than, as must be the case, innocent. The error in this case was aggravated by the government's refusal, despite the defendant's offer to do so, to open its files for mutual discovery as proposed by the Judicial Committee on Pre-trial Procedure, 37 F.R.D. 95 (1965).

The second issue is whether the trial court abused its discretion in not striking upon timely motion and objection vague testimony regarding an automobile driven on one occasion by the witness with the permission of the defendant. The car involved in Count I was a white 1961 Chevrolet Impala. The witness Harrell testified that on one occasion she used a white Chevrolet parked in the driveway of the



defendant's home. The witness, despite a leading question by the prosecution, refused to state that the car was a 1961 Chevrolet, stating only that it was approximately a 1960, 1961 or 1962 white Chevrolet. She could not recall the number of doors or anything else that meaningfully established that the car she drove was the car referred to in Count I. The fact as testified to by both Harrell and Menz, that the car could be operated without a key, is not in any way significant since all Chevrolets of this approximate vintage can be operated without a key if the ignition is left in other than the lock position. (See testimony of the automobile repairman Vernon Hurst in this regard (T. 78)). The admission of the testimony is particularly aggravated since no one, not even the government's informer, Menz, placed the defendant Duncan in possession of the vehicle. It may well be that this skimpy, vague and without foundation testimony tipped the scales, in the jury's mind, against the defendant. The evidence was not merely repetitive of the fact of possession of the automobile by Duncan; it was the only testimony, however tenuous, establishing control by the defendant of the vehicle. Under these circumstances we submit that it was an abuse of discretion for the trial court not to strike the testimony.



ARGUMENT

I. Because of the Skeleton Pleading of the Indictment, Denial of Motion for a Bill of Particulars Violated Defendant's Constitutional Right to be Informed of the Nature and Cause of the Accusation.

The defendant, along with his co-defendant, Judson Wesley Rainey, was charged (in typical barebones fashion) with the knowing receipt and concealment of two stolen motor vehicles. Each of the two counts of the indictment simply charged the defendant in the words of the statute and provided as concrete information only the following: the approximate date of the offense, the year, model and manufacturer of the vehicle, the points between which the automobile was moving, and that the receipt and concealment was somewhere within the State of Arizona. Specifically omitted from the indictment was such basic information as from whom the vehicle was received, where it was received and concealed, and whether either of the defendants drove the motor vehicle. The trial court's failure to require the government to specify the exact dates and times involved precluded any efforts to develop an alibi: a time-honored and valid defense. No person, absent the most unusual circumstances (e.g. hospitalization), can specifically state where he was "on or about the 11th day of September, 1965" or "on or about the 18th day of October, 1965." Given the modern day emphasis on statutory pleading, and the generalities

allowed by Rule 7(c) of the Federal Rules of Criminal Procedure, the indictment was sufficient to withstand a motion to quash. However, as repeatedly noted by the federal courts, the rules must be read as a uniform whole; in this instance as a delicate counterbalancing of the rights of the defendant under the inexorable command of the Sixth Amendment to be advised of the nature and cause of the accusation and the government's right not to be entangled in a web of pleading technicalities. However, because we are dealing with a constitutional privilege, any statutory inroads are to be construed strictly. Russell v. United States, 369 U.S. 749, 82A Sup. Ct. 1038, 8 L. Ed. 2d 240 (1962). The Supreme Court in Russell, discussing the protections afforded by an indictment, made it clear that the:

" . . . basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure, [as] is illustrated by many recent Federal decisions." (369 U.S. at 765-66, 82A Sup. Ct. at 1048).

However, the defendant's quarrel is not with the indictment as such, but rather with the failure of the trial court to compel the government to disclose anything beyond the information contained in the indictment. The defendant's request through a bill of particulars for basic information concerning the alleged offenses (R. 9-11) was specifically denied as to each particular requested. As a result of



negotiation suggested by the trial court following denial, counsel for the defendant additionally learned from the government that the alleged place of concealment was Phoenix, Arizona (a city encompassing approximately 187 square miles according to the Statistical Abstract of the United States, 1965), the serial number of each of the vehicles, and the parties in possession of the vehicles at the time of theft. Beyond this, counsel for the defendant was totally ignorant of the essential facts of the case until Robert Menz, a convicted perjurer (T. 48-49), testified as the government's third witness. Upon such short notice defense counsel was totally unable to develop an effective cross-examination or impeaching material. There was simply no way for the defendant upon such short notice to check out the witness's story as to dates, times and places. Nor, as already noted, did defendant have any opportunity to establish the defense of alibi or inability. The case represents--in this supposedly enlightened day and age--a classic throwback to the era of "blind man's bluff" litigation. The refusal of the trial court to grant any aspect of the motion is particularly ironic, coming as it does on the heels of the amendment of Rule 7(f) "to encourage a more liberal attitude by the courts towards bills of particulars without taking away the discretion which courts must have in dealing with such motions

in individual cases." (Committee Note to 1966 Amendment to Rule 7(f)).

Simply stated, it is the defendant's position that the trial court abused its discretion by not making available to the defendant before trial at least the rudimentary facts of the offenses. To state that this area is discretionary, as defendant must concede is the case, Cook v. United States, 354 F.2d 529 (9th Cir. 1965), does not provide the answer unless the review function is to be abrogated totally. It is submitted that on these facts there can be only one conclusion: the trial court erred in not granting the motion for a bill of particulars. The government's hackneyed phrase in its motion in opposition to the motion for a bill of particulars, that is, that the material sought is "evidentiary" (R. 15), certainly is not a proper basis for the exercise of discretion; the particulars sought were very limited and restrained and truly pertinent to the allegations of the indictment. The government, sanctioned by the trial court, has simply adopted the advantages of notice pleading without accepting the requirements of disclosure imposed by the other sections of the Rules.

In Lauer v. United States, 320 F.2d 187 (7th Cir. 1963) the Seventh Circuit ruled that an indictment charging the sale of narcotics in violation of Sec. 4705(a), 26 U.S.C.,

was defective in that it did not set forth the name of the purchaser. The identity of the purchaser of narcotics in cases such as Lauer is completely analogous to the identity of the transferor of the automobiles in the instant case. Therefore, these narcotics cases, and what the courts have said about them, will be examined at some length.

The Lauer decision has been criticized by the other courts of appeals, including the Ninth Circuit, and was finally overturned by the Seventh Circuit itself in Collins v. Markley, 346 F.2d 230 (7th Cir. 1965) cert. denied, 382 U.S. 946, 86 Sup. Ct. 408, 15 L. Ed. 2d 355 (1966). However, in distinguishing or refusing to follow Lauer, the various courts of appeals, including this one, strongly emphasized not that the information should be withheld, but rather that the defendant should develop the facts through a bill of particulars rather than challenging the sufficiency of the indictment itself. It is fair to state that the reviewing courts simply assumed as a matter of course that the information would be supplied upon proper motion.

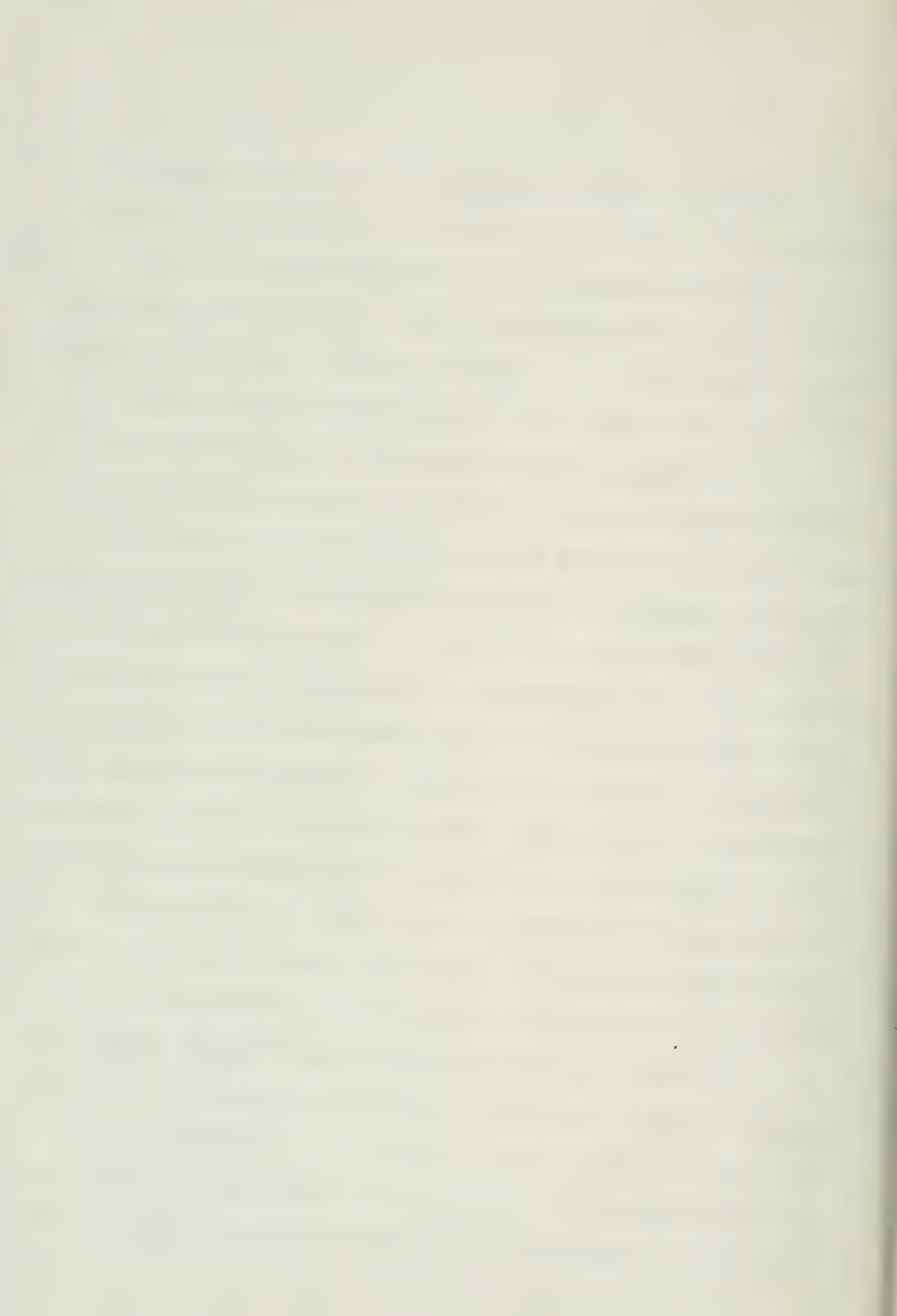
Even in the case which reversed Lauer, Collins v. Markley, supra, the Seventh Circuit took pains to point out that the defendant was well aware of the identity of the purchaser and that the court was not reaching the situation "where . . . the name of the purchaser is not stated in the



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indictment and the defendant, before trial, has demanded the disclosure of such name, and such name has not been disclosed." In McDowell v. United States, 330 F.2d 920 (10th Cir. 1964) cert. denied, 377 U.S. 1006, 84 Sup. Ct. 1944, 12 L. Ed. 2d 1055 (1964), the Tenth Circuit, answering an argument similar to that employed in Lauer, pointed out that there had been no effort to procure the purchaser's name before trial. By way of contrast, the defendant in the present case not only filed a bill of particulars but also, pursuant to the suggestion of the Committee on Pre-trial Procedure in 37 F.R.D. 95 (1965), offered at the pre-trial to exchange files with the government (P.T. 2-5).

The district court in Taylor v. United States, 224 F. Supp. 82 (W.D. Mo. 1963), also responding to an argument that the indictment was defective for failing to name the purchaser of the narcotics, emphasized the role of the bill of particulars in giving flesh to the pleading skeleton.

"In a case involving an indictment or information in the standard form as is involved in this case, we believe that most district judges, and certainly the district judges that serve this Court, would, upon a proper showing, sustain a motion for a bill of particulars as a matter of course.

"The acceptance of the theory of notice pleading by the Rules of Criminal Procedure may not be viewed in isolation. Those rules must be viewed as a coordinated system for the administration of criminal justice. Particular attention must therefore be focused

on the rules providing for discovery. See Bowman Dairy Co. v. United States, 341 U.S. 214, 71 S.Ct. 675, 95 L.Ed. 879 (1951).

"But the question of whether discovery should be permitted is an entirely different question from whether an indictment or an information is fatally defective. In regard to the former question, Mr. Justice Brennan, in his article 'The Criminal Prosecution: Sporting Event or Quest for Truth?', 1963 Wash. U.L.Q. 279, 293, recognized that 'the extent to which discovery should be allowed in particular cases will present complex problems. There will be questions for the exercise of sound discretion depending upon the particular materials of which discovery is sought. * * * In other words, there will be much need for the striking of a proper balance in individual cases'". (224 F. Supp. at 84-5).

On appeal, the district court's philosophy was sustained, the appellate court reiterating that "a motion for a bill of particulars would undoubtedly have brought forth the information claimed to be lacking." Taylor v. United States, 332 F.2d 918, 921 (8th Cir. 1964).

In United States v. Dickerson, 337 F.2d 343 (6th Cir. 1964), Lauer was again criticized and not followed, but, much more importantly to the present discussion, the court pointed out that "[i]f for any reason defendant had needed more information at an earlier date, he had available a motion for a Bill of Particulars under Rule 7(f)." (See also United States v. Debrow, 346 U.S. 374, 74 Sup. Ct. 113, 98 L. Ed. 92 (1953), where the Supreme Court makes precisely the same point.)

The foregoing discussion, which could be continued at length, without profit, makes it clear that if the prosecution wishes to adopt the convenience of notice pleading it may do so, provided, however, that it does not thereby jeopardize the defendant's constitutional right to know the nature and cause of the accusation against him. Defendant submits that in this cause the defendant's right to be apprised under the Sixth Amendment has in fact been violated by the trial court's denial of even the simple matters inquired into by the bill of particulars. A contrary holding flies directly into the Committee's announced purpose in regard to the amendment of Rule 7(f): that the district courts henceforth view motions for bill of particulars more generously.

II. The Trial Court Erred in Not Striking the Testimony of Beverly Harrell.

The only evidence in linking the defendant Duncan to the 1961 Chevrolet Impala forming the basis of Count I consisted of the testimony of the government's informant Menz (See Statement of the Case, pp.4-5, supra) and the extremely tenuous connection supplied by the witness Harrell. At no time did Menz's testimony place Mr. Duncan in physical possession of the automobile or explain the role of Rainey.

In an effort to connect the defendant Duncan to the automobile, the government called as a witness one Beverly Harrell who was renting a room from Mr. Duncan in the

fall of 1965. Mrs. Harrell was asked if, while living at the Duncan residence, she saw a 1961 Chevrolet at the house. Her answer was:

"I seen a Chevrolet. I can't say exactly 1961, but it is approximately close." (T. 63).

Defense counsel then objected to further inquiry until further foundation was laid; "approximately 1961 is not material."* Later, by leading the witness, the government established that the year was "approximately" 1961 (T. 64). The witness then testified that she drove the car on one occasion without the use of a key which was presumably offered to tie in to the testimony of Menz that he had been able to steal the car without the proper key (T. 33); this ignores, of course, the well-known fact that Chevrolets of this vintage can be started without a key if the ignition is

*Generally, a motion to strike must be preceded by an objection. In this case defense counsel promptly objected as soon as the lack of foundation appeared. Before this, defense counsel had no way of knowing that adequate foundation could not be laid. Thus the myriad of cases holding that a motion to strike cannot be granted unless preceded by a valid objection are inapposite, see e.g. Benson v. United States, 146 U.S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991 (1892). Since the testimony of the witness was related only to the 1961 automobile, and no other aspect of the case, the motion to strike was properly directed to the witness's entire testimony, cf. Lewis v. State, 55 Fla. 54, 45 So. 998 (1908).



left in the on or off position rather than in the lock position (Hurst testimony, T. 78).

Following her direct testimony, defense counsel renewed his motion to strike Harrell's testimony as unconnected and because there had been "no identification with the vehicle in question" (T. 65). Later on cross-examination, the witness's lack of familiarity with the vehicle she drove and the tenuousness of her testimony was again established.

"Q I believe you said that you thought this was approximately a 1961 Chevrolet. Was it approximately a 1962 Chevrolet?

"A Well, I couldn't say exactly.

"Q Was it approximately a 1960 Chevrolet?

"A Yes.

"Q What you can honestly say, it was a white Chevrolet?

"A Oh, yes, the one I drove was a white Chevrolet.

"Q Was it a two-door, four-door?

"A I can't be positive now.

"Q And do you recall what the interior was?

"A Oh, average. Nothing rich, real rich.

"Q Can you tell us the style? Was it a Supersport?

"A It wasn't anything sporty.

"Q What?

"A It wasn't anything sporty." (T. 67-68).

Defense counsel again moved at the end of the government's case to have the testimony stricken (T. 109-111). The motion was again denied (T. 110-111).

Again, of course, we are in the area of trial court discretion; again defendant submits that the lower court abused its discretion in not striking the Harrell testimony. As in the case of denial of a bill of particulars, the trial court's discretion in this area is not unlimited. Many recent federal and state decisions attest that material improperly in the record and not struck upon demand constitutes good grounds for reversal of an otherwise varied conviction. Sumrall v. United States, 360 F.2d 311 (10th Cir. 1966); Torres v. United States, 333 F.2d 99 (10th Cir. 1964); Massei v. United States, 241 F.2d 895 (1st Cir. 1957) affirmed 355 U.S. 595, 78 Sup. Ct. 495, 2 L. Ed. 2d 517 (1958); United States v. Venuto, 182 F.2d 519 (3rd Cir. 1950); People v. Lewis, 152 Cal. App. 2d 824, 313 P.2d 972 (1957); Cole v. State, 109 Ga. App. 576, 136 S.E.2d 483 (1964); Pruitt v. State, 216 Tenn. 686, 393 S.W.2d 747 (1965).

Although no case precisely on point has been located, several of the foregoing cases provide useful illustrations of circumstances which warrant exclusion, upon motion, of evidence improperly before the jury. In Sumrall v. United States, supra, the trial court refused to strike

a police officer's inadmissible reference to the defendants' prior records. Although the evidence of guilt was "overwhelming," the appellate court reversed, refusing to regard the error as harmless. The evidence of prior criminal records improperly admitted in the Sumrall case may be inherently more objectionable than the evidence of Mrs. Harrell allowed to stand by the trial court in the instant case. Its total effect on the outcome of the case was conceivably no greater, however, since the only evidence truly linking the defendant to the automobiles, other than that coming through the lips of an informer in the control of the government who had testified for the prosecution before (T. 52), was Mrs. Harrell's vague reference to a white Chevrolet of uncertain age she drove in the "early fall" of 1965. In United States v. Venuto, supra, it was held to be error not to strike a government witness's testimony regarding his preparation of a statement of the defendant's net worth when, upon cross-examination, it appeared that the witness did not have information essential to such a tabulation. In other words, the holding fairly stands for the well-known proposition that a lay witness should not be permitted to give testimony other than that within his own knowledge.

Equally interesting and pertinent to this discussion are such state cases as Cole v. State, supra, and People v.



Lewis, supra, both of which hold that where the witness's testimony is without proper predicate, as in the instant case, it should be stricken. In Cole, a larceny of an automobile case, the witness testified that he knew the defendant lived in the house in question. Upon examination it turned out that the witness's statement was not derived from his own personal knowledge. It was held error not to exclude the testimony. Likewise, in Lewis, a witness's statements as to the defendant's reputation were held properly excluded when it was demonstrated that the witness's knowledge of the defendant's reputation was limited to the military base at which he served. The defendant does not contend that these cases are precisely on point with the instant facts; however, these cases do stand for the proposition, well established in the common law, that a witness should only be allowed to testify to matters clearly within his personal knowledge. These cases also suggest that the exclusion or admission of evidence will receive greater appellate scrutiny in criminal cases than in civil cases.

In the instant case the witness Harrell was permitted to testify, in effect, despite timely objection as soon as the infirmity appeared, to a matter not within her knowledge: that the car she drove in 1965 was the

1961 Chevrolet referred to in Count 1. This testimony regarding possession of the automobile by the defendant was particularly critical since uncorroborated by any other witness and should have been stricken upon the defendant's timely motion. Understandably, the prosecution did not fail in its final argument to emphasize Mrs. Harrell's testimony, particularly the fact that the car could be driven without a key (T. 124-25, 139).

CONCLUSION

We respectfully submit that the failure of the government to provide the defendant with the particulars requested violated his right to be apprised of the nature and cause of the accusation and violated his rights under the Sixth Amendment. Similarly, and independently, the refusal of the court to strike the vague and tenuous testimony of the witness Harrell, who offered the only testimony at all corroborative of the government's informer as to Duncan's participation in the offenses, was so prejudicial as to require reversal of the proceedings below.

LEWIS ROCA BEAUCHAMP & LINTON

By John J. Flynn
Robert A. Jensen

Attorneys for Appellant

June, 1967

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Robert A. Jensen

CERTIFICATION OF DELIVERY

Robert A. Jensen, one of the counsel for the defendant William Warden Duncan hereby states that he delivered three copies of the foregoing Appellant's Brief to the United States Attorney, Federal Building, Phoenix, Arizona, this day, June 9, 1967.

Robert A. Jensen



APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM WARDEN DUNCAN and
JUDSON WESLEY RAINEY,

Defendants.

NO. C-17477-PCT.

MOTION FOR BILL
OF PARTICULARS

(Oral Argument Requested)

William Warden Duncan, one of the defendants in the above entitled matter, moves the Court for an order requiring the Government to furnish the said defendant, within a time therein specified, a written bill of particulars as to the following matters alleged in the Indictment herein, without which particulars the defendant is not effectively informed of the charges filed against him and cannot adequately prepare his defense. The movant requests the right to amend this motion after the government's bill of particulars is filed. Without knowing the precise charges against this defendant, it is impossible to state the exact items which may in the future be material to the preparation of his defense or give the reasons and grounds for their production.

1. From whom does the Government allege William Warden Duncan and Judson Wesley Rainey received the 1961 Chevrolet Impala as alleged in Count I?

2. Where does the Government claim that the 1961 Chevrolet Impala was concealed as alleged in Count I?

3. Is it contended by the Government that the defendant William Warden Duncan drove the 1961 Chevrolet Impala referred to in Count I?

4. If the answer to question No. 3 above is "yes", set forth the date or dates on which such car was driven and the places from which and to which the car was driven by the said defendant.

5. Is it contended by the Government that the defendant Judson Wesley Rainey drove the 1961 Chevrolet Impala referred to in Count I?

6. If the answer to question No. 5 above is "yes", set forth the date or dates on which such car was driven and the places from which and to which the car was driven by the said defendant.

7. Where within the State and District of Arizona is it contended by the Government that the defendants received the 1961 Chevrolet Impala as alleged in Count I?

8. Has the Government ever charged any person other than the named defendants with the receipt or concealment of the 1961 Chevrolet Impala referred to in Count I of the Indictment?

9. If the answer to question No. 8 is "yes", set forth the name and address of the person so charged.

10. What is the serial number of the 1961 Chevrolet Impala referred to in Count I of the Indictment?

11. From whom does the Government allege William Warden Duncan and Judson Wesley Rainey received the 1964 Chevrolet Impala Supersport as alleged in Count II?

12. Where does the Government claim that the 1964 Chevrolet Impala Supersport was concealed as alleged in Count II?

13. Is it contended by the Government that the defendant William Warden Duncan drove the 1964 Chevrolet Impala Supersport referred to in Count II?

14. If the answer to question No. 13 above is "yes", set forth the date or dates on which such car was driven and the places from which and to which the car was driven by the said defendant.

15. Is it contended by the government that the defendant Judson Wesley Rainey drove the 1964 Chevrolet Impala Supersport referred to in Count II?

16. If the answer to question No. 15 above is "yes", set forth the date or dates on which such car was driven and the places from which and to which the car was driven by the said defendant.

17. Where within the State and District of Arizona is it contended by the Government that the defendants received the 1964 Chevrolet Impala Supersport as alleged in Count II?

18. Has the Government ever charged any person other than the named defendants with the receipt or concealment of the 1964 Chevrolet Impala Supersport referred to in Count II of the Indictment?

19. If the answer to question No. 18 is "yes", set forth the name and address of the person so charged.

20. What is the serial number of the 1964 Chevrolet Impala Supersport referred to in Count II of the Indictment?

21. Does the Government know of or have in its possession evidence favorable to the defendant?

22. If the answer to question No. 21 above is "yes", set forth the nature of such evidence, its present location, and the name and address of all persons having or claiming to have information regarding such evidence.

DATED this 6th day of October, 1966.

LEWIS ROCA SCOVILLE BEAUCHAMP & LINTON

By s/ Robert A. Jensen
Robert A. Jensen
Attorneys for Defendant Duncan
900 Title & Trust Building
Phoenix, Arizona 85003

[Memorandum of Points and Authorities Omitted]

Copy of the foregoing Motion
and Memorandum mailed this
6th day of October, 1966, to:

WILLIAM COPPLE, Esq.
United States Attorney
United States Court House
Phoenix, Arizona

s/ ROBERT A. JENSEN
Robert A. Jensen

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM WARDEN DUNCAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 21,709

APPELLEE'S BRIEF

FILED

SEP 7 1967

WM. B. LUCK, CLERK

EDWARD E. DAVIS
United States Attorney

MORTON SITVER
Assistant U. S. Attorney
5000 Federal Building
Phoenix, Arizona 85005

Attorneys for Appellee

SEP 11 1967

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM WARDEN DUNCAN,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 21,709

APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

On April 27, 1966, the Grand Jury for the District of Arizona, at Phoenix, indicted appellant, William Warden Duncan, and Judson Wesley Rainey, alleging in two counts that the defendants had violated Title 18, United States Code, Section 2313, Receiving and concealing Stolen Motor Vehicles Moving in Inter-State Commerce. On July 5, 1966, the appellant was present with counsel for his arraignment in the United States District Court for the District of Arizona, at Phoenix, and entered pleas of not guilty to both counts of the indictment, No. C-17477-Phx. The co-defendant, Judson Wesley Rainey was arraigned at the same time and also entered pleas of not guilty to both counts of the indictment.

On December 13, 1966, the date set for trial, appellant filed a Motion for Separate Trial which was joined in by the co-defendant; Judson Wesley Rainey. The Court granted appellant's motion and the case proceeded to trial as to him only.

On December 14, 1966, the jury returned a verdict of guilty as to both counts of the indictment. On January 9, 1967, the Court sentenced the appellant to a term of five years imprisonment under the provisions of Title 18, United States Code, Section 4208(a)(2) on each count and a fine of one thousand dollars, both sentences to run concurrently. Thereafter on February 20, 1967, the co-defendant, Judson Wesley Rainey entered a plea of guilty to Count I of the indictment, imposition of sentence was suspended and he was placed on probation for three years.

Appellant William Warden Duncan brings this appeal from the judgment and sentence of the trial Court. The jurisdiction of the Court on this direct appeal is created by Title 28, United States Code, Section 1291, and the timely filing of the Notice of Appeal. Appellant has been at liberty on bond pending the outcome of this appeal.

STATEMENT OF FACTS

Appellant was charged by indictment with violations of Title 18, United States Code, Section 2313. That section reads as follows:

"Whoever receives, conceals, stores, barter, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

The indictment was substantially in accord with Form 7, Federal Rules of Criminal Procedure, with the exception that it contained allegations of a more specific nature than those contained in the form. Count I of the indictment was in the following language:

"On or about the 11th day of September, 1965, WILLIAM WARDEN DUNCAN and JUDSON WESLEY RAINEY, in the State and District of Arizona, did receive and conceal a stolen motor vehicle, to-wit: a 1961 Chevrolet Impala which was moving as interstate commerce from Los Angeles, State of California, to Phoenix, State of Arizona, and they then knew the motor vehicle to have been stolen."

Count II was in the same form with the exception that there were differences as to date, description of the vehicle, and place of origination of the transportation. That offense allegedly occurred on the 18th day of October, 1965, the vehicle was a 1964 Chevrolet Impala Supersport, and the car was alleged to have been moving from Huntington Park, State of California.

On October 6, 1966, appellant filed his Motion for Bill of Particulars, a copy of which is set forth as an Appendix to his brief. The motion was argued on November 14, 1966 before the same Court that presided over the trial of this case and was denied. Leave was given, however, to renew the motion at a pre-trial conference to be held pursuant to Rule 17.1, Federal Rules of Criminal Procedure.

The pre-trial conference was held on December 8, 1966. Present were the trial judge, counsel for the appellant, counsel for the appellee, counsel for the co-defendant, and a court reporter. (Please note that the transcript of proceedings of the pre-trial conference is mistakenly numbered C-17636-Phx., and should read C-17477-Phx.). A further hearing was also held on the appellant's Motion for Bill of Particulars. At that time appellee advised the court that it had supplied some of the information requested by appellant in his motion and agreed to formally make that a part of the record by filing a Bill of Particulars with the Court (Pre-Trial Tr. p. 2). A copy of that Bill of Particulars is included as an Appendix to this brief. In its initial response to appellant's motion, appellee also had stated that the government had no knowledge of any evidence favorable to the defendant believed to be material to the ultimate issue of guilt or innocence. As to all other matters requested in the appellant's motion, the

motion was denied (Pre-Trial Tr. p. 2). No agreement was reached concerning a voluntary exchange of information between the appellant and the appellee.

On December 13, 1966, immediately preceding the trial, appellant filed a Motion for Separate Trials. Prior to that motion being argued, appellee advised appellant's counsel in answer to an additional item sought in the Motion for Bill of Particulars that another individual had been charged with possession of the vehicle described in Count II of the indictment. Counsel for the appellant indicated he already knew this. Appellee further advised counsel that no one had been charged with possession of the vehicle described in Count I of the indictment other than appellant and his co-defendant. (Tr. p. 114). The appellant's Motion for Separate Trials was granted and the case proceeded to trial against the appellant, William Warden Duncan, only. (Tr. p. 4).

A representative of Bell Auto Sales, Inc., 2909 South Figueroa, Los Angeles, California, testified that the company was the owner of a 1961 Chevrolet on or about September 9th through 11th, 1965. (Tr. p. 10). The car was a white Impala coupe and sometime during the above period of time the car was stolen from the company lot in Los Angeles (Tr. p. 20). The license number of the vehicle was California License No. JCF 146 and the plates were on the car at the time of the theft (Tr. p. 20).

Plaintiff's Exhibit 1, the Certificate of Ownership kept by the company, was admitted into evidence (Tr. p. 19). It shows that the vehicle identification number is 11837L110169. The keys were not taken when the car was stolen (Tr. p. 21).

The secretary-treasurer of John Schleifer, Inc., Huntington Park, California, another car dealer, testified that the corporation owned a 1964 Chevrolet on or about October 15th through 18th, 1965 (Tr. p. 22). He identified plaintiff's Exhibit 2 as the company record reflecting ownership of this vehicle and the inventory card was admitted into evidence (Tr. p. 25). On October 15, 1965, the car was on the company lot at 5920 Pacific Boulevard, Huntington Park, California (Tr. p. 25). The car was discovered missing on approximately October 16, 1965, and no permission had been given anyone to remove the vehicle (Tr. p. 26). It was described as a two-door, white, Supersport coupe (Tr. p. 27). Exhibit 2 reveals that the vehicle identification number of the car was 41447L131153.

The evidence showed that an individual named Robert Menz stole the two automobiles referred to in Counts I and II of the indictment. Mr. Menz testified that he had conversations with the appellant during the early part of September, 1965, one of which took place at the appellant's house in Phoenix (Tr. p. 30). The conversations involved the possible disposition of

stolen automobiles, and during one of these conversations the appellant said that he knew of someone who could handle such matters (Tr. p. 30).

On September 10, 1965, Menz telephoned from Los Angeles, California, and spoke with appellant at his home in Phoenix (Tr. p. 31). Menz asked the appellant if he could use an automobile and the response was in the affirmative. The appellant specifically stated that he could use a 1961 Chevrolet. During the conversation it was mentioned that Menz would steal such a car (Tr. p. 32). On that same evening Menz located a 1961 Chevrolet on a car lot in the 2200 block on South Figueroa, Los Angeles, California. Later that night he returned to the lot and stole the car (Tr. p. 33). He was able to drive that car despite the fact that he had stolen the wrong key due to the fact that the switch had been turned merely to the "Off" position instead of to the "Lock" position (Tr. p. 33-34).

Menz arrived in Phoenix the following morning, telephoned the appellant and was instructed to deliver the car to Shorty Brown's Club Lido on East McDowell Road in Phoenix (Tr. p. 35). At the Club Lido he met the appellant and Mr. Rainey. The appellant asked where the car was and Menz informed him that it was in the parking lot behind the Club Lido. The appellant and Rainey went out to look at the car, came back in stating that it was all right and told Menz to take the car down

to the Doll House on 32nd Street and McDowell. He was further instructed to take the license plates off and park the car in the rear (Tr. pp. 35-36). Menz met the appellant at the Doll House at which time the appellant handed him approximately \$200.00 wrapped in a napkin (Tr. p. 36). He identified Government's Exhibit 3 as a picture of an automobile of the same make and model as the one he drove from Los Angeles (Tr. p. 37).

Menz then left Phoenix and returned to California. On Approximately October 15, 1965, he again called the appellant and asked whether the appellant could use any more cars. The appellant stated that he could use a 1964 Chevrolet (Tr. p. 37). Menz found such a vehicle on the lot of John Schleifer Motors in Huntington Park, California, stole it, and drove it to Phoenix, Arizona, on approximately that same date (Tr. p. 38). After some telephone conversations with the appellant, Menz delivered the car to Shorty Brown's Club Lido that following Monday (Tr. p. 41). Prior to that on Sunday, Menz had driven the car to the appellant's house where appellant removed the spare tire and brought it in the house (Tr. p. 41). On Monday when the car was delivered to the Club Lido - both the appellant and Rainey were present and went outside to inspect the car (Tr. p. 42). Menz was instructed to drive the car to the Doll House as he had done with the 1961 Chevrolet and take the license plates off (Tr. p. 43). He drove the car to the Doll House but did not remove the plates. At the Doll House he met the appellant and

Rainey at which time the appellant handed him approximately \$170.00 (Tr. p. 43). He identified Government's Exhibit 4 as a picture of a vehicle of the same type and body style that he stole on October 15, 1965 (Tr. p. 45).

The appellant and Menz had a telephone conversation on approximately December 10, 1965, after Menz had returned to California. As a result of that conversation Menz came to Phoenix and went to the appellant's house in Phoenix. The appellant told him that a Mr. Hurst had been arrested in connection with the cars, that the F.B.I. had picked up both vehicles but that there was nothing for Menz to worry about because there was no connection between Hurst and Menz (Tr. pp. 47-48). On cross-examination Menz stated that he had been convicted of three felony charges and that he had not been charged in connection with the two stolen vehicles referred to in the indictment against the appellant (Tr. pp. 48-49).

In the early fall of 1965, Beverly Harrell was renting a room at the appellant's residence in Phoenix. She testified that she saw a white Chevrolet, approximately a 1961 model, at the appellant's house (Tr. p. 63). On one occasion when she needed a car to drive the appellant suggested that she drive this vehicle (Tr. p. 64). She further testified that she was not given a key for this car but was able to start it by turning the ignition knob (Tr. p. 65). Appellant moved to strike this testimony as being unconnected with the issues in the case,

which motion was denied (Tr. p. 53).

An employee of the Arizona State Highway Department testified that she had supervision of the records of the motor vehicle bureau. She stated in response to a question concerning a search of those records that she had found no registration for a 1961 or 1964 Chevrolet in the Appellant's name for the year 1965, nor did she find a registration for any Chevrolet in his name for that year (Tr. p. 54).

Vernon Hurst was engaged in the business of automobile body repairing and painting during October, 1965, at his residence in Phoenix, Arizona. He testified that he had left Phoenix on a trip during that month and when he returned on October 22nd he noticed two vehicles on his property that had not been there when he left. One was a 1961 Chevrolet two-door hardtop; the other was a 1964 Chevrolet two-door hardtop (Tr. p. 72). He identified Government's Exhibits 3 and 4 as being pictures of the same type of vehicles that were at his house (Tr. pp. 72-73). On December 7, 1965, he drove the 1964 Chevrolet off his property and was arrested for possession of stolen property (Tr. p. 73). The license plate that was on the 1964 Chevrolet came from the Rainey Brothers Used Car Lot (Tr. p. 75). Originally both cars had dealer plates on them but Mr. Rainey had taken one of them back (Tr. p. 77).

Hurst further testified that there was a key for the 1964 Chevrolet but none for the 1961 model. However, due to the fact that the ignition in the 1961 car was left in the "On" position it was possible to drive it without a key (Tr. p. 78).

During 1965 Yvonne Hurst was Vernon Hurst's wife. She testified that on approximately October 21, 1965, Judson Wesley Rainey drove up to her house in a light-colored Chevrolet, while her husband was away on a trip (Tr. p. 84). He left and returned with another light-colored Chevrolet (Tr. p. 85). She identified Government's Exhibits 3 and 4 and reflecting the same type of cars that Rainey had driven to her house (Tr. p. 85). Rainey drove the cars onto the back lot, an area beyond the house and parked them behind a lot of shrubbery (Tr. p. 86). The cars were still at that location on November 5th when she moved out of the house (Tr. p. 86). On cross-examination she stated that she recognized the appellant but never had any conversations with him about the automobiles nor had she seen him near the cars (Tr. pp. 87-88). She had seen appellant at her house several months prior to the theft of the vehicles (Tr. p. 89).

The remaining testimony consisted of the events surrounding the arrest of Vernon Hurst in the 1964 Chevrolet and the examination made of the vehicles by a police officer and a special agent of the F.B.I. The 1961

Chevrolet was on the property of Vernon Hurst on the date of his arrest. Examination of the serial numbers on both vehicles revealed that they were respectively identical with the numbers of the cars stolen in California by Robert Menz. Government's Exhibits 3 and 4 were identified by the F.B.I. agent as being photographs of the cars he examined on December 8, 1965 (Tr. p. 98). The dealer plates found on the 1964 Chevrolet had been issued to Rainey Brothers (Tr. p. 99).

At the close of the Government's case the appellant again moved to strike the testimony of Beverly Harrell on the grounds that the testimony was immaterial and not relevant to the issues in the case, which motion was again denied (Tr. p. 109). The defense rested without offering any evidence (Tr. p. 111).

After final arguments and instructions the case was submitted to the jury. The defendant was found guilty of both counts charged in the indictment (Tr. p. 160).

SUMMARY OF ARGUMENT

RESPONSE TO SPECIFICATION OF ERROR NO. 1

The District Court did not err in refusing to grant appellant's Motion for a Bill of Particulars. (Tr. p. 2). The allegations of the indictment together with the information voluntarily furnished by the appellee in its Bill of Particulars were sufficient to adequately advise appellant of the nature and cause of the accusation against him. The Court did not abuse its discretion in denying appellant's motion.

RESPONSE TO SPECIFICATION OF ERROR NO. 2

The District Court properly denied appellant's motion to strike the testimony of Beverly Harrell (Tr. p. 65, 109). The testimony was relevant and material on the issues of receiving and concealing the vehicle described in Count I of the indictment. Any inconsistency or vagueness in the testimony was a matter of weight rather than admissibility and such testimony was properly submitted to the jury.

ARGUMENT

1. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION FOR A BILL OF PARTICULARS

An application for a bill of particulars is addressed to the sound discretion of the trial court. Cook v. United States, 354 F.2d 529 (9th Cir. 1965); Remmer v.

United States, 205 F.2d 277 (9th Cir., 1953). Under the facts of this case the trial court properly denied the motion for a bill of particulars.

The appellant filed a motion for a bill of particulars seeking responses to some twenty-two items. This motion related not to a complex charge involving broad issues but to relatively simple allegations of receipt and concealment of two specific motor vehicles, which were moving in interstate commerce, with the knowledge that they had been stolen.

The purpose of a bill of particulars is to protect a defendant against a second prosecution for an inadequately described offense, and to enable him to prepare an adequate defense. Cook v. United States, supra. The indictment charged the offenses in language that was somewhat more specific than that contained in Form 7, Federal Rules of Criminal Procedure. The indictment and the bill of particulars combined informed the appellant of the following with reference to the charges brought against him in each count:

1. The approximate date of the alleged offenses (on or about the 11th day of September, 1965; on or about the 18th day of October, 1965).
2. The name of the person jointly charged with him (Judson Wesley Rainey).

3. The city within the District of Arizona where the vehicles were allegedly received and concealed (Phoenix).

4. A description of the stolen vehicles which were allegedly received and concealed together with the name and address of the owners (a 1961 Chevrolet Impala, white in color, serial number 11837L110169, owned by Bell Auto Sales, 2909 South Figueroa, Los Angeles, California; a 1964 Chevrolet Impala Supersport, white in color, serial number 41447L131153, owned by John Schleifer, Inc., 5920 Pacific Boulevard, Huntington Park, California).

5. The places from which the vehicles originated as interstate commerce and the place to which they were driven (Los Angeles, California to Phoenix, Arizona; Huntington Park, California to Phoenix, Arizona).

The items requested in the motion for a bill of particulars were purely evidentiary in nature. An example of this is apparent in Items 3, 4, 5, 6, 13, 14, 15 and 16, wherein appellant sought to determine whether the government would contend that either he or

his co-defendant drove the vehicles in question, and if so, the places from which and to which the cars were driven. The appellant was not charged with transporting the vehicles but with receiving and concealing them.

The appellant urges that he should have been supplied with the exact date of the alleged receipt and concealment of the vehicles. Yet in his motion for a bill of particulars he did not ask for a more specific date or time, although that matter was orally raised at the pre-trial conference. Furthermore, even had he asked for this information in his written motion it could not have been supplied due to the continuing nature of the offenses charged.

The appellant further argues that he should have been supplied with the specific location where the cars were allegedly concealed and the name of the person from whom the vehicles were received. In support of this he cites a case in another circuit where the name of the buyer of narcotics was required to be revealed prior to trial together with the specific location where the sales occurred.

The merit of each request for this type of information should be decided on a case by case basis. The trial court's action on a bill of particulars is discretionary and should not be disturbed in the absence of an abuse of that discretion. Medrano v. United States,

Very often in cases involving the sale of narcotics the issue of entrapment is raised. It may therefore become most important to know the name of the buyer and specific facts surrounding the transaction. Even in these instances the matter is discretionary with the trial court. In the case now before the court there is not the slightest hint of an issue of entrapment.

It is difficult to see how the possible defense of alibi was thwarted by a denial of the motion. Alibi depends on an individual being at a different place at the time of the offense. Once the evidence showed the place or places where the offenses occurred, appellant could have introduced testimony to show that he was at another place at that time. This he failed to do but that failure can in no way be attributable to the denial of the motion for a bill of particulars.

The appellee objected to supplying certain items in appellant's motion on the grounds that to so specify might tend to restrict the scope of the evidence at the trial (Tr. p. 5). The evidence at the trial revealed that the cars were kept at different locations in Phoenix for varying periods of time. The government should not be required to select a specific location and include that in a bill of particulars prior to trial, when the evidence is of such a nature.

As to the individual from whom the vehicles were received, he testified at the trial and was vigorously cross-examined. The appellee objected to revealing his name prior to trial for fear of possible physical danger to him. The witness, Robert Menz, was confined on another charge. This court can take notice as a matter of common knowledge that individuals who are confined in penal institutions and who are called to testify by the government are often in danger of being physically harmed. Under the circumstances of this case revealing Menz's name would have also revealed that he would be a witness at the trial.

There was no prejudice to the appellant in the denial of the motion for a bill of particulars. He was able to attack the credibility of the witness Menz by the use of prior felony convictions and in other ways. At the pre-trial conference counsel for appellant had indicated to the court that he reserved a right to request a continuance after the government presented its case for the purpose of presenting a defense to matters revealed at the trial (Pre-trial tr. p. 4). The court did not in any way indicate that it would not grant such a request. At no time, however, was such a request made.

One basis for the motion for a bill of particulars was that without it appellant would be limited in his opportunity to present a motion to sever (Pre-trial tr. p. 3). However, such a motion was made on the day of trial and was granted by the Court. (Tr. p. 4).

From the record before and at the trial it does not appear that appellant was prejudiced by the denial of the motion for a bill of particulars. He was adequately informed of the nature of the charges against him so as to allow him to prepare a defense. The Court did not abuse its discretion. Roberson v. United States, 249 F.2d 737 (5th Cir.,1957); Churico v. United States, 287 F.2d 666 (5th Cir.,1961).

2. THE TRIAL COURT PROPERLY
DENIED APPELLANT'S MOTION TO
STRIKE TESTIMONY OF THE WITNESS
BEVERLY HARRELL

Beverly Harrell testified that she had rented a room from the appellant at his home in Phoenix and that during the early fall of 1965 she saw a white Chevrolet of the approximately model year 1961 at that home (Tr. p. 63). There was no key available for the car but she was able to start the engine without one. She was permitted to drive the car by the appellant.

Other testimony revealed that there were no Chevrolet automobiles registered to appellant in Arizona during the year 1965 (Tr. pp. 69-70). The testimony of Robert Menz, the individual who stole the 1961 Chevrolet and delivered it to appellant and the co-defendant Rainey was to the effect that due to the position of the ignition he could drive the car although he did not have the right key (Tr. pp. 33-34). Vernon Hurst, to whose house the 1961 Chevrolet was eventually delivered, testified that

there was no key for the car but due to the position of the ignition it could be started without a key (Tr. p. 78).

The evidence was relevant and material to the issue of receipt and concealment of the 1961 Chevrolet described in Count I of the indictment. Any doubts which might have arisen from uncertainty or contradiction in the testimony were for the jury alone and they were not a ground for withdrawing the testimony from the jury's consideration. United States v. Greenstein, 153 F.2d 551 (2nd Cir., 1946).

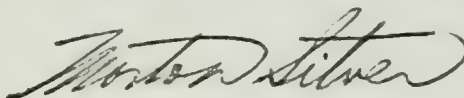
Mrs. Harrell described the car by approximate model year and color. She was staying at appellant's house during the period following the receipt of the car at Phoenix. The circumstances of a car of similar description being driven by Beverly Harrell, Robert Menz and Vernon Hurst, taken together with the time period and the fact that appellant had no similar car registered in his name, was sufficient basis to allow Mrs. Harrell's testimony to stand. The question was one of weight to be attached to the testimony rather than the admissibility of it. This was a jury function and the Court properly instructed the jury in this regard (Tr. p. 147). The denial of the motion to strike was not error.

CONCLUSION

The Court did not abuse its discretion in denying the appellant's motion for a bill of particulars, nor did it commit error in refusing to strike the testimony of a witness. The judgment and sentence of the District Court should be affirmed.

Respectfully submitted,

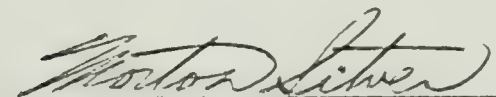
EDWARD E. DAVIS
United States Attorney



MORTON SITVER
Assistant U. S. Attorney

Copies of the foregoing
Appellee's Brief mailed this
6th day of September, 1967,
to:

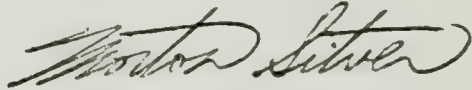
LEWIS ROCA BEAUCHAMP & LINTON
John J. Flynn
Robert A. Jensen
114 West Adams Street
Phoenix, Arizona 85003
Attorneys for Appellant



MORTON SITVER
Assistant U. S. Attorney

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with these rules.

A handwritten signature in cursive script, appearing to read "Morton Sitver".

MORTON SITVER
Assistant U. S. Attorney

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM WARDEN DUNCAN and
JUDSON WESLEY RAINEY,

Defendants.

NO. C-17477-PHX.

BILL OF PARTICULARS

COMES NOW the plaintiff, United States of America, by and through its attorneys undersigned and formally gives notice of the following particulars previously furnished to the defendant, WILLIAM WARDEN DUNCAN, through his attorney, Robert A. Jensen, on November 30, 1966, and to the defendant JUDSON WESLEY RAINEY, through his attorney, J. William Moore, on December 5, 1966:

1. The 1961 Chevrolet Impala and the 1964 Chevrolet Impala Supersport described in the indictment were received and concealed at Phoenix, Arizona.

2. The serial number of the 1961 Chevrolet Impala is 11837L110169. At the time of the theft it was owned by and in the possession of Bell Auto Sales, 2909 South Figueroa, Los Angeles, California. The color of the vehicle is white.

3. The serial number of the 1964 Chevrolet Impala Supersport is 41447L131153. At the time of the theft it was owned by and in the possession of John Schleifer Incorporated, 5920 Pacific Boulevard, Huntington Park,

California. The color of the vehicle is white.

Respectfully submitted,

RICHARD C. GORMLEY
United States Attorney

/s/ Morton Sitver
MORTON SITVER
Assistant U. S. Attorney

Copy of the foregoing mailed this
12th day of December, 1966, to:

ROBERT A. JENSEN
Attorney for Defendant William Warden Duncan
900 Title & Trust Building
Phoenix, Arizona 85003

J. WILLIAM MOORE
Attorney for Defendant Judson Wesley Rainey
730 First National Bank Building
Phoenix, Arizona

/s/ Morton Sitver
MORTON SITVER
Assistant United States Attorney

STATE OF ARIZONA }
COUNTY OF MARICOPA }

ss. CERTIFICATE OF MAILING

MORTON SITVER, being first duly sworn,
upon his oath deposes and says:

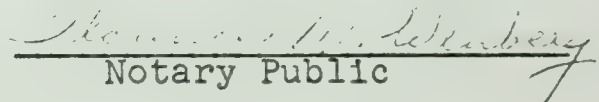
That the foregoing Appellee's Brief has this
6th day of September, 1967, been mailed to attorneys
for appellants, John J. Flynn and Robert A. Jensen
in the law firm of Lewis Roca Beauchamp & Linton,
114 West Adams Street, Phoenix, Arizona, 85003.

DATED: September 6, 1967.



MORTON SITVER
Assistant U. S. Attorney

Subscribed and sworn to before me this 6th day of
September, 1967.


Notary Public

My commission expires September 4, 1969.

NO. 21709

In The

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

WILLIAM WARDEN DUNCAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

LEWIS ROCA BEAUCHAMP & LINTON

By John J. Flynn
Robert A. Jensen

114 West Adams Street
Phoenix, Arizona 85003

Attorneys for Petitioner

FILED

MAR 5 1968

WM. B. LUCK, CLERK

MAR 8 1968

NO. 21709

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114 West Adams Street
Phoenix, Arizona 85003

Attorneys for Petitioner

TABLE OF AUTHORITIES

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NO. 21709

In The

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

WILLIAM WARDEN DUNCAN,)
)
Petitioner,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Respondent.)

PETITION FOR REHEARING

The petitioner in the above entitled cause, by and through his attorneys undersigned, respectfully petitions the Court to rehear this cause and upon such rehearing reverse the judgment of the District Court, and enter a new opinion on behalf of this Court. The following grounds support this petition.

1. The principal issue presented by this appeal from the District Court's judgment upon the jury's verdict is whether a defendant, charged with receiving and concealing stolen motor vehicles in violation of Title 18, Section 2313, U.S.C., is entitled to know the most basic information regarding the alleged offense.

2. The petitioner by means of a bill of particulars

duly filed on October 6, 1966, sought to learn such information as from whom and where the cars had been received, where they were concealed, whether either of the defendants drove the cars, and the pertinent dates of these activities. The motion was denied as to all twenty-two of the particulars. As a result of a later informal conference with the government's attorneys, the defendant-petitioner additionally learned that the cars had been received and concealed somewhere in Phoenix, Arizona, and the serial number, owner and color of each of the two vehicles involved.

3. Maintaining that they were unable to learn even basic information from a defendant who steadfastly maintained his innocence, defense counsel at the pre-trial conference on December 8, 1966, five days before trial, asserted that they were unable because of lack of specificity to develop the defense of alibi or otherwise prepare an adequate defense (P.T. 2-3). Both defendants then offered to open their files upon the government doing likewise in accordance with Rule 17.1, Federal Rules of Criminal Procedure, and the suggestions of the Committee on Pre-trial Procedure as set forth in 37 F.R.D. 95 (1965). The government refused (P.T. 5). The defendant then proceeded to trial knowing absolutely nothing other than the minimal information contained in the indictment, the serial number, owner and color of the vehicles, and the alleged place of receipt and concealment.

4. The only witness who connected the petitioner to the receipt and concealment of the automobiles in question was

a government informant, Robert Menz, presently serving time in a federal prison. The only other witness who was able to in any way link the petitioner to the vehicles was a Beverly Harrell who testified that in the "early fall" of 1965, while staying at the petitioner's home, she on one occasion used a white Chevrolet of undertermined vintage--1960, 1961 or 1962 (T. 63, 64, 67).

5. During the past several years the federal courts, including the United States Supreme Court, as well as various eminent study groups (see, for example, the report of the Committee on Pre-trial Procedure, 37 F.R.D. 95 (1965)), have all urged the expansion of the amount of discovery and information which a person charged with a crime may receive under proper safeguards. This philosophy has received formal approval and recognition by virtue of the amendment of Rule 7(f), Federal Rules of Criminal Procedure. The Committee's notes to the amendment, which was effective July 1, 1966, states that the purpose of the amendment was "to encourage a more liberal attitude by the courts towards bills of particulars...."

6. At trial, because they were not advised of the identity of the person from whom the petitioner allegedly received the car and the other particulars, the petitioner's attorneys were extremely handicapped. They had, five days before trial, indicated to the District Court the nature and extent of their handicap (see P.T. 2-3). Their offer to open their files for inspection upon the government doing likewise

was refused. (See Rule 17.1, Federal Rules of Criminal Procedure and Committee on Pre-trial Procedure, 37 F.R.D. 95, 101 (1965).)

7. This Court in its opinion treated the granting or denying of a bill of particulars as "a matter within the discretion of the trial judge...." So it is, but the issues raised by this appeal go further. They go, in fact, to the very heart of the proper implementation of the rules of criminal procedure and the petitioner's right, under the Sixth Amendment, to know the "nature and cause of the accusation." Skeletal pleading such as the government is now permitted and which was used in this case makes it imperative that the petitioner and all others similarly situated receive their full measure of the counter-balancing rights and procedures contemplated by the drafters of the Rules. Because they did not know the identity of the person who allegedly delivered the vehicles, defense counsel were unable before trial to check on his background or his whereabouts on the days in question. His prior record, including perjury, makes his credibility highly suspect. Nor is it any answer, particularly when the witness is an inmate of a federal prison, working closely with the Federal Bureau of Investigation, and acting in his own self-interest (T. 58-60), to suggest, as this Court did, that a continuance during the trial might have solved the problem. Defendants should not be put to this test, rather, as the rules contemplate they should be permitted to use fully before trial the various procedures contemplated by the Rules; at the very



least, the denial of the bill of particulars was an abuse of discretion.

For these reasons, therefore, the Court should rehear this case and reverse its affirmance of the judgment below.

Respectfully submitted,

LEWIS ROCA BEAUCHAMP & LINTON

By John J. Flynn
Robert A. Jensen

Attorneys for Petitioner

March, 1968.

I certify that, in connection with the preparation of this petition for rehearing, in my judgment it is well founded and that it is not interposed for delay.

Robert A. Jensen

CERTIFICATION OF DELIVERY

Robert A. Jensen, one of the counsel for the petitioner William Warden Duncan hereby states that he delivered three copies of the foregoing Petition for Rehearing to the United States Attorney, Federal Building, Phoenix, Arizona, this day, March 4, 1968.

Robert A. Jensen

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN L. BATTAGLIA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

OCT 5 1967

WM. B. LUCK CLERK

BRIEF OF APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,

United States Attorney,

DAVID R. NISSEN,

Assistant U. S. Attorney,
Chief, Special Prosecutions
Division,

GERALD F. UELMEN,

Assistant U. S. Attorney,

827 U. S. Court House

312 N. Spring Street

Los Angeles, California 90012

Attorneys for Appellee,
United States of America

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312 N. Spring Street

Los Angeles, California 90012

Attorneys for Appellee,

United States of America

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IN THE UNITED STATES COURT OF APPEALS
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JOHN L. BATTAGLIA,

Appellant,

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BRIEF OF APPELLEE

I

STATEMENT OF THE PLEADINGS
DISCLOSING JURISDICTION

On August 19, 1964, the Appellant was convicted in the United States District Court for the Southern District of California on six counts of an indictment charging the willful transmission of telephone calls for the purpose of executing a scheme to defraud, in violation of 18 United States Code §1343. The Honorable Roger D. Foley, United States District Judge for the District of Nevada, presided at his jury trial. Upon direct appeal to this Court, the conviction as to Counts One and Two of the indictment was affirmed on July 12, 1965. Battaglia v. United States, 349 F.2d 556. A

petition for a writ of certiorari was denied by the United States Supreme Court on December 13, 1965. 382 U.S. 955. On March 3, 1966, Judge Foley modified the sentence of Appellant to provide for consecutive five year terms of imprisonment on each of Counts One and Two, with eligibility for parole on Count Two to be determined according to the terms of 18 United States Code §4208(a)(2).

On July 15, 1966, the Appellant filed a Motion to Vacate his Conviction, pursuant to 28 United States Code §2255, alleging that he was mentally incompetent to understand the proceedings against him at trial, and that he was denied the effective assistance of counsel during the proceedings against him [C. T. 2]. ^{1/} A full hearing on the motion, at which the Appellant was present and represented by counsel, was held before Judge Foley on September 20 and 21, 1966. On October 3, 1966, Judge Foley entered Findings of Fact, Conclusions of Law and Judgment denying Appellant's motion [C. T. 17]. On November 15, 1966, Appellant filed a Notice of Appeal from the Order entered by Judge Foley [C. T. 21].

On December 20, 1966, Appellant filed a Motion for New Trial, pursuant to Rule 60(b), Federal Rules of Civil Procedure, seeking a new hearing on his Motion to Vacate the Conviction on the grounds of improper conduct of the trial judge, as well as insufficiency of the evidence to sustain the judgment. At this time, Appellant also filed an affidavit of bias and prejudice against Judge Roger D. Foley [C. T. , Supplemental Record on Appeal]. On

^{1/} "C. T. " refers to Clerk's Transcript of Record on Appeal.

January 18, 1967, Judge Foley entered an order assigning the case to Chief Judge Thurmond Clarke for all further proceedings, who in turn transferred the matter to Judge Leon R. Yankwich.

Meanwhile, Appellant had made several efforts to obtain his release on bail pending this appeal and the hearing of the Motion for New Trial. A Motion for Bond Pending Appeal, filed November 15, 1966, was denied by Judge Foley on November 28, 1966. On December 21, 1966, Appellant filed a Motion for bail pending hearing of his Motion for New Trial.

Appellant's Motion for New Trial and for bail pending hearing of the motion were heard by Judge Yankwich on January 23, 1967. Both were denied in an order entered January 25, 1967.

On February 14, 1967, Appellant filed in this Court an application for bail pending appeal, as well as a Motion for leave to file a Petition for a Writ of Mandamus. Both were denied by this Court in an order entered May 9, 1967 [Misc. No. 3208]. A Motion for Reconsideration was similarly denied on August 17, 1967. On September 7, 1967, Appellant's application to Mr. Justice Douglas for bail pending this appeal was denied.

An understanding of these proceedings is aided by a brief account of the proceedings in a companion case, Case No. 66-2078-Y in the Court below. On December 28, 1966, Appellant filed a Petition for a Writ of Habeas Corpus, raising the same issues that were raised in his Motion to Vacate under 28 United States Code §2255, and are being raised on this appeal. An application for bail pending hearing on the Petition for Writ of

Habeas Corpus was granted on December 28, 1966 by Chief Judge Thurmond Clarke, who vacated his order on the same day. On January 16, 1967, Judge Leon R. Yankwich entered an order denying the Petition. Appellant's efforts to appeal from this denial were thwarted on February 14, 1967, by the refusal of Judge Yankwich to issue a Certificate of Probable Cause pursuant to 28 United States Code §2253. Judge Yankwich's Order was upheld by this Court on April 26, 1967 [Misc. No. 3272].

The jurisdiction of the District Court to entertain Appellant's Motion to Vacate was founded upon §2255, Title 28, United States Code. The jurisdiction of this Court over the appeal is based upon §§ 1291 and 1294(1), Title 28, United States Code.

II

STATUTES INVOLVED

Title 28, United States Code, §144 provides as follows:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists,

and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. "

Title 28, United States Code, §2255 provides as follows:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues

and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant

has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. "

III

STATEMENT OF FACTS

By an order entered after a pre-trial conference conducted by Judge Foley on August 26, 1966, it was stipulated that evidence offered at the hearing on Appellant's Motion to Vacate his Conviction would be limited to five issues of fact:

- (1) Was the petitioner adequately represented by competent counsel in the criminal proceedings?
- (2) Was there any knowing use of perjured testimony or suppression of evidence by the prosecutor in the criminal proceedings?
- (3) Was petitioner mentally competent, i. e., able to understand the nature of the proceedings against him and to cooperate with counsel in his defense at all stages of the criminal proceeding?
- (4) Is Petitioner likewise competent at all stages of this civil proceeding?
- (5) Is Petitioner adequately represented by competent counsel in this civil proceeding?

At the hearing held before Judge Foley on September 20-21, 1966, the Appellant offered evidence on issues of fact Numbered 1 and 3 [C. T. 19].

Appellant's contention that he was mentally incompetent to understand the proceedings against him and to cooperate with counsel in his defense was primarily based upon his own testimony that he consumed a large quantity of drugs during the course of the trial proceedings. Each of these drugs will be considered separately.

The Appellant testified that during the trial period, extending from August 10th through August 19th, 1964, he would generally take two or three capsules of Nembutol at night [R. T. 192]. ^{2/} Dr. Maurice W. Rosenberg, the doctor who prescribed this drug for the Appellant, described it as a hypnotic barbituate, for the purpose of inducing sleep [R. T. 110]. It was prescribed in the "average" dose [R. T. 111], and the doctor stated that "most people take it two at a time" [R. T. 112]. Dr. Rosenberg's prescription was offered into evidence [R. T. 64], and it contained the directions: "One when needed for sleep" [R. T. 81].

Appellant testified that he would take seven or eight Fiorinal tablets each day during the trial [R. T. 193]. Fiorinal was described by Dr. Rosenberg as "a prescription similar to Anacin plus some barbiturates", which is used for headaches [R. T. 121]. The directions contained on the prescription No. 75706,

^{2/} "R. T." refers to Reporter's Transcript.

offered in evidence, were "one every four hours when needed for headache" [R. T. 71, 81]. In his testimony, however, Dr. Rosenberg stated that two every four hours would be the usual average, not a strong dose [R. T. 130].

Appellant stated that during the latter part of the trial period, he took two and a half or three Dexamil each day, his intake being less than this during the early part of the trial [R. T. 194]. Dr. Rosenberg described Dexamil as a stimulant, "made out of a compound called amphetamine, which is similar to caffeine. It tends to make you more active, more wide awake" [R. T. 113]. There were two prescriptions for Dexamil offered in evidence, No. 70614 [R. T. 65] and No. 74315 [R. T. 69]. The directions on both of these prescriptions were "as directed" [R. T. 81].

Appellant also testified that, upon arising each morning of the trial, he would take one Darvon to counteract the effects of the Nembutol he had taken the night before [R. T. 195-196]. Darvon was described by Dr. Rosenberg as a non-narcotic analgesic, used to relieve pain [R. T. 121]. One prescription for this drug was offered in evidence [R. T. 72]. It contained the directions "One every four hours when needed for pain" [R. T. 82].

Finally, the Appellant testified that he consumed four to seven swallows of Phenergan each day of the trial [R. T. 196]. Dr. Rosenberg characterized Phenergan as a liquid cough medicine containing antihistamine [R. T. 108], which was prescribed to counteract "the symptoms of a cold, which is a runny nose" [R. T. 109]. The prescription for Phenergan which was offered in

evidence [R. T. 62] contained the directions "one teaspoon every four hours for cough" [R. T. 81].

Although a number of other prescriptions were offered into evidence [R. T. 54-77], they covered a period of several years, and the Appellant himself testified that the five drugs mentioned above were the only ones he was taking during the period of the trial proceedings [R. T. 196].

Dr. Rosenberg testified that he had served as Appellant's physician from December, 1952 until February, 1963 [R. T. 101-102]. The circumstances under which the prescriptions in question were issued to the Appellant were described by Dr. Rosenberg as follows:

"Q. From time to time in the past whenever you would see him would he suggest to you various medications that he wanted to try?

"A. Well, I will take a look. I don't recall, but most of these medications he has gotten recently have been on his own suggestion.

"Q. Well, how recently are we talking about?

"A. The prescriptions that you gave me here, from March '63 on down [R. T. 119].

"Q. Would it be a fair statement to say that you received a phone call from Mr. Battaglia or a pharmacist and said: I would like to try this or that particular medication?

"A. If I thought it would benefit him or it

wouldn't do him any harm. I wouldn't object to prescribing it for him." [R. T. 120].

The doctor further testified that he was not concerned about the number of times the Appellant was securing refills of these prescriptions, because:

"I didn't think he was taking an excessive amount because Nembutol, many people, as I say, have to take as many as four, many people take two Seconals and two Nembutols to sleep. As you use these things you become more and more resistant to their effects. The things like Fiorinal or Librium, or even Declo -- the amphetamines, the Darvon, of course, he can take all he wants, there is no harmful effect." [R. T. 131-132].

None of the drugs prescribed by Dr. Rosenberg could be classified as narcotics [R. T. 138]. According to his testimony, one was a stimulant and the other a sleeping pill, and if taken as prescribed they would have no effect on the Appellant's mental condition during the hours of trial [R. T. 136]. Indeed, the doctor testified that if one took the drugs described in the amount which the appellant testified he took them, he would be alert [R. T. 238-239].

Appellant contended below, however, that two extraneous factors contributed to the effects these drugs had upon his mental condition: a liver condition, and the amount of alcohol he was consuming. Dr. Howard Bowman testified that he first examined the Appellant on April 6, 1965 [R. T. 7]; that on subsequent examinations he arrived at a diagnosis of portal cirrhosis of the liver [R. T. 13]. In Dr. Bowman's opinion, this condition could have existed for several years prior to his diagnosis [R. T. 15], but he was unable to state whether the disease was in a period of relapse or remission during the trial period of August, 1964, one year prior to his diagnosis [R. T. 17-18]. Dr. Bowman further stated that a substantial intake of barbiturates by a cirrhotic could increase the symptoms of cirrhosis [R. T. 19-20], which include apathy, fatigue, somnolence, forgetfulness and confusion [R. T. 14]. Dr. Rosenberg testified that the knowledge the Appellant suffered from portal cirrhosis would not have deterred him from prescribing barbiturates [R. T. 132]. The Appellant testified that he was in the habit of consuming a quart of wine daily with his meals, as well as several martinis and other drinks [R. T. 174]. Indeed, Dr. Bowman attributed his cirrhosis mainly to the ingestion of alcohol [R. T. 15]. However, the Appellant himself testified that during the period of the trial he substantially reduced his alcoholic intake, reducing it to a couple of glasses of wine with his meals [R. T. 197]. Dr. Rosenberg testified at length as to the effect of alcohol on each of the drugs he prescribed for the Appellant. The effect of alcohol on Nembutol, he testified, would depend upon the amount of alcohol

or Nembutol that a person is accustomed to taking [R. T. 126]. The alcohol would cause one to go to sleep faster, but the effect of the drugs would wear off faster than the effects of the alcohol [R. T. 128-129]. Regarding Fiorinal, Dr. Rosenberg stated "if you had a headache to begin with and took a lot of Fiorinal and then drank some alcohol on top of it, which seems rather silly, but I suppose a person could, I think they would go to sleep" [R. T. 130]. As to Dexamil, the doctor testified that one who took a substantial amount of alcohol after taking a substantial amount of Dexamil "would have difficulty staying on his feet and he probably would annoy people, and things of that sort" [R. T. 128]. Finally, Dr. Rosenberg stated that the cough medicine, Phenergan, contained alcohol, so additional alcohol would not affect it [R. T. 125-126].

The most serious conflict in the testimony, of course, revolved around the effects which the consumption of these drugs, together with alcohol and the liver ailment, had upon the Appellant's mental condition during the trial. Appellant himself testified that, during the month preceding the trial, he was "unable to function mentally" [R. T. 184], and during the trial itself, he could see less clearly and couldn't speak without slurring his words [R. T. 199]. He stated he asked his co-counsel, Mr. Hollopeter, to move for a continuance because he did not feel well [R. T. 188] but was told there had been too many continuances already and another would not be sought [R. T. 200-201]. ^{3/} Appellant's trial counsel, Harold

^{3/} Apparently, no such motion was ever made [R. T. 201-202].
An earlier request for a continuance for Appellant to undergo surgery had been granted [R. T. 175].



A. Abeles, testified he had difficulty conversing with Appellant, that at times Appellant became vague and disjointed [R. T. 24]. Mr. Abeles stated he did not call this to the attention of the Court because he understood his co-counsel, Mr. Hollopeter, who withdrew from the case on the first day of trial, had already called the matter to the Court's attention by means of a motion for a continuance [R. T. 36]. Appellant also offered the testimony of his nephew, Joseph C. Battaglia, who stated he visited his uncle frequently at home during the trial period, and described his uncle's condition during this period as "almost incoherent" [R. T. 150], as well as the testimony of attorney Edward I. Ritz (sic: Gritz) who described an encounter in a hallway during the trial in which he had difficulty explaining an unrelated business transaction to the Appellant [R. T. 159].

In the course of the hearing below, the Appellee offered the testimony of three witnesses who had observed the condition of the Appellant during the course of his trial. Benjamin S. Farber was an Assistant United States Attorney assigned to the trial of the Appellant. He recalled several occasions in the course of the trial when he conversed briefly with the Appellant, and he testified that Appellant was responsive and nothing unusual in his demeanor was noticed [R. T. 242, 244]. During the trial itself, he observed Appellant watching the jury during the testimony of witnesses, grimacing at the testimony of one particular witness [R. T. 243]. John A. Mitchell was also an Assistant United States Attorney assigned to Appellant's trial. He recalled conversing with

Appellant twice during the course of the trial. First, a discussion about Saratoga, New York, in a hallway during a recess [R. T. 250-256], and second, a meeting in the prosecutor's office where certain tapes to be used in evidence were played for Mr. Battaglia and his attorney [R. T. 250-257]. On both occasions, the Appellant appeared to be coherent and was able to follow the conversation [R. T. 250]. In fact, on the second occasion, when listening to the tapes, the Appellant would make joking remarks responsive to crucial points in the tapes [R. T. 261]. Finally, Special Agent Woodrow R. McCully of the Federal Bureau of Investigation, who was present during the Appellant's trial, testified that he conversed with Mr. Battaglia at least twice each day and on every occasion Appellant responded directly to his statements and questions [R. T. 263-264].

Appellant did not testify at his trial. At the hearing below, he testified that he at all times expected to be called as a witness on his own behalf, but was never called [R. T. 216-217]. His trial attorney testified that the matter was discussed with appellant, and the decision not to call the appellant to the witness stand was partially influenced by his physical condition [R. T. 27, 33] although other factors affected the decision, including the prospect of impeachment by prior convictions [R. T. 37-38]. In this connection, John A. Mitchell testified that the Appellant had testified at a hearing regarding reduction of bail on November 15, 1963, at which time he understood the questions asked and responded appropriately [R. T. 251, 253-254].

At the conclusion of all of the evidence, Judge Foley found that the Appellant had failed to sustain his burden of proof upon each of the factual allegations of the Motion [R. T. 299, 300]. Formal Findings of Fact and Conclusions of Law were entered and filed one week later [C. T. 17].

IV

SPECIFICATION OF ERRORS

Three questions emerge from the argument presented in appellant's opening brief:

- (1) Did the Appellant sustain his burden of proving that he was not mentally competent at all stages of the criminal proceeding?
- (2) Did the Appellant sustain his burden of proving he was not adequately represented by competent counsel in the criminal proceedings?
- (3) Was the Appellant denied a fair hearing by pre-judicial misconduct of the trial judge?

V

ARGUMENT

- A. THE APPELLANT DID NOT SUSTAIN HIS BURDEN OF PROVING THAT HE WAS NOT MENTALLY COMPETENT AT ALL STAGES OF THE CRIMINAL PROCEEDING.
-

The standard to be applied in determining the mental competency of an individual to stand trial is that set forth by the Supreme Court in its per curiam decision of Dusky v. United States, 362 U.S. 402 (1960):

"The test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him."

Where the question of competency to stand trial is raised on a motion to vacate a conviction under 28 U.S.C. §2255, after the trial proceedings have been completed, the burden falls upon the petitioner to establish that he was incompetent to stand trial. As stated by Judge Holtzoff of the United States District Court for the District of Columbia:

"Obviously, the burden of proof on a motion to vacate a sentence under 28 U.S.C. §2255 is on the moving party, because there is a presumption

of regularity of the conviction. The burden is particularly heavy if the issue is one of fact and a long time has elapsed since the trial of the case."

United States v. Bostic, 206 F. Supp. 855, 856-57 (1962), affirmed 317 F.2d 143 (D.C. Cir. 1963); Accord: Ingling v. United States, 303 F.2d 302, 304 (9th Cir. 1962); United States v. Tom, 340 F.2d 127, 128 (2nd Cir. 1965); Johnston v. United States, 292 F.2d 51 (10th Cir.), cert. denied 368 U.S. 906 (1961).

To sustain his burden of proving his incompetence, the Appellant had to prove more than the mere fact that he was taking drugs at the time of trial. Even the use of narcotic drugs does not per se render a defendant incompetent to stand trial. United States v. Tom, supra. Incompetency turns upon the degree to which the drugs affect the rational processes of the defendant, hence his ability to consult with counsel and understand the proceedings against him. In making this determination, the courts have generally given great weight to three factors:

- (1) Whether the defendant's stream of speech is clear, coherent and adequate to communicate with his counsel;
- (2) The defendant's memory for the events concerning the offense with which he is charged;
- (3) The defendant's memory of the events surrounding the trial itself.

See Johnson v. Settle, 184 F. Supp. 103, 106 (W.D. Mo.

1960); United States v. Burdette, 161 F. Supp. 326 (E.D. Mich. 1957), affirmed 254 F.2d 610 (6th Cir. 1958), cert. denied 359 U.S. 976.

In considering these factors, it is apparent, first, that there was a serious conflict in testimony as to whether the Appellant's stream of speech was clear and coherent. In ruling on this matter, the trial judge clearly indicated that he chose not to believe the Appellant, his nephew, or Mr. Abeles [R. T. 298, 299]. In a collateral attack upon a judgment, as in other proceedings, credibility of the witnesses is for the trier of facts to decide, even with respect to testimony not formally contradicted. Hawk v. Olson, 326 U.S. 271, 279 (1945); Smith v. United States, 339 F.2d 519, 526 (8th Cir. 1964).

Secondly, the Appellant offered no evidence that his memory of the events concerning the offense was in any way impaired. The only description of pre-trial consultations was that offered by Mr. Abeles, Appellant's trial counsel:

"A. I was trying to elicit all of the facts of the case and the problem was that I had difficulty obtaining them from him, and mostly it was he was somewhat vague and indicated to me that they would be revealed to me in due time.

"Q. Mr. Abeles, did you find Mr. Battaglia deliberately vague?

"A. I couldn't say. I really don't, I don't, -- I don't know." [R. T. 31-32].

Finally, the Appellant's memory of the events surrounding the trial itself showed a keen awareness of what was transpiring. He remembered how he came to court in the morning, and how he returned home each evening [R. T. 206]. He recalled specific conversations with Agent McCully and the Assistant United States Attorneys [R. T. 207-208]. He remembered conferences with his attorneys, in many instances relating the conversations occurring during these conferences word for word [R. T. 187-198; 200-201; 203-205; 213; 216-218]. He related the names of visitors to his home during the trial period [R. T. 208-209] as well as the business transactions he was engaged in during this period [R. T. 209-211]. Finally, of course, the Appellant recited a detailed schedule of the drugs he was taking, when he took them, and the amount of alcoholic beverages he consumed [R. T. 192-196]. Appellant's testimony at the hearing offered no substantiation of his claim he had "but scant memory of the actual trial proceedings" [C. T. 8]. To the contrary, he displayed a convenient memory, anxious to provide only the alleged details which would advance his claim of incompetency.

On this record, it is clear that there was more than sufficient evidence to sustain the trial court's conclusion that Appellant was mentally competent at all stages of the criminal proceedings. Compare United States v. Tom, 340 F.2d 127 (2nd Cir. 1965).

B. THE APPELLANT DID NOT SUSTAIN
HIS BURDEN OF PROVING THAT HE
WAS NOT ADEQUATELY REPRESENTED
BY COMPETENT COUNSEL IN THE
CRIMINAL PROCEEDINGS.

The Appellant's contention below that he was not adequately represented by competent counsel at trial related only to the conduct of Mr. Abeles, in failing to call to the attention of the trial court that Appellant was unable to communicate with him and assist him in the trial [R. T. 266-268]. It was not contended below, nor is it contended on appeal, that Appellant was in any way prejudiced by any conduct of Mr. Hollopeter, or by the substitution of attorneys occurring on the first day of trial.

In light of the court's disposition of Appellant's contention that he was mentally incompetent to stand trial, any other disposition of Appellant's argument as to adequate representation of counsel would have been inconsistent. As stated by the trial judge:

"If he was competent, as Mr. Lally has argued, then he was able to assist his counsel and he could have taken the stand if such had been the decision. So his argument that he was deprived of his right to testify and that he was deprived of a fair trial by virtue of his inability to assist his counsel all are based on the contention he was incompetent at the time of trial, and I just don't feel from the record in this case alone, without looking at the criminal proceedings, that petitioner has met the burden of

proof." [R. T. 300].

This Court has repeatedly held that the standard to be applied in evaluating the adequacy of trial counsel is that the counsel's performance must be so incompetent as to make the trial "a farce or a mockery of justice". Rivera v. United States, 318 F.2d 606, 608 (9th Cir. 1963) and cases cited therein.

Far from Appellant's trial being a farce, the trial judge found that Mr. Abeles "ably represented the defendant in the criminal proceedings. I think he is an accomplished and skillful trial lawyer." [R. T. 299].

As to the decision not to call the Appellant as a witness at his trial, the court below refused to believe that this decision was based upon any mental incompetence on the Appellant's part [R. T. 286-287]. To the contrary, in light of the other factors considered [R. T. 37-38], it appears to have been "an example of good trial tactics by an attorney versed in the criminal law". Hudgins v. United States, 340 F.2d 391 (3rd Cir. 1965).

C. THE APPELLANT WAS NOT DENIED
A FAIR HEARING BY PREJUDICIAL
MISCONDUCT OF THE TRIAL JUDGE.

During the course of the hearing on Appellant's motion, Judge Foley on numerous occasions referred to his recollection of the trial proceedings [R. T. 29; 267; 276-277; 286-287]. In alleging that Judge Foley was biased, Appellant seizes upon two of

these instances. First, in discussing the credibility of Mr. Abeles, Judge Foley referred to an incident in which this attorney had misquoted him in presenting to the Court of Appeals what had occurred during a conference in chambers [R. T. 276-79]. Secondly, in passing upon the credibility of the Appellant himself, the judge referred to information that had been contained in the pre-sentence report submitted prior to Appellant's sentencing [R. T. 298].

Although he would have been fully warranted in doing so, Judge Foley did not consider the incident described above in passing upon the credibility of Mr. Abeles. On three occasions, he stated that he found the testimony of Mr. Abeles questionable quite apart from this incident [R. T. 280; 286; 301]. Judge Foley rejected Mr. Abeles' testimony on the basis of its inherent improbability [R. T. 286-87; 299]. It has long been held that the trier of fact need not accept even uncontradicted testimony if it is inherently incredible. Quock Tring v. United States, 140 U.S. 417, 420-21 (1891); Factor v. C.I.R., 281 F.2d 100, 111 (9th Cir. 1960), cert. denied, 364 U.S. 933; Wong Ken Foon v. Brownell, 218 F.2d 444, 446 (9th Cir. 1955).

As to the reference to the pre-sentence report, Appellant's characterization of this document as a "secret police report" [Appellant's Opening Brief, pp. 7, 8, 13] is somewhat misleading. The pre-sentence report is submitted to the Court pursuant to Rule 32, Federal Rules of Criminal Procedure. As such, it is part of the files and records of Appellant's trial, although its disclosure is subject to the limitations of Rule 32(c).

Appellant's contention that Judge Foley should not have presided over his motion to vacate his conviction ignores one of the basic reasons §2255 of the judicial code was enacted. As stated in Carvell v. United States, 173 F.2d 348, 348-349 (4th Cir. 1949):

"Complaint is made that the judge who tried the case passed upon the motion. Not only was there no impropriety in this, but it is highly desirable in such cases that the motions be passed on by the judge who is familiar with the facts and circumstances surrounding the trial, and is consequently not likely to be misled by false allegations as to what occurred. It was to avoid the unseemly practice of having attacks upon the regularity of trials made before another judge through resort to habeas corpus that Section 2255 of Title 28 was inserted in the Judicial Code."

Accord: United States v. Smith, 337 F.2d 49 (4th Cir. 1964), cert. denied 381 U.S. 916; Dillon v. United States, 307 F.2d 445, 453 (9th Cir. 1962) (Barnes, C. J., dissenting). In Smith v. United States, 259 F.2d 125, 126 (9th Cir. 1958), this Court noted the propriety of a trial court considering its own recollection of what transpired at the trial in passing upon a subsequent motion to vacate on grounds of inadequate representation by counsel. See also Scherk v. United States, 242 F. Supp. 445, 450 (N.D. Calif. 1965).

Appellant also refers to Judge Foley's observation that



"there is a faint possibility here that this whole thing is an after-thought" [R. T. 280] as further evidencing his bias and prejudice. This argument is reminiscent of Reiff v. United States, 299 F.2d 366, 367 (9th Cir. 1962), cert. denied 372 U.S. 937, wherein the appellant asserted that because the trial judge denominated certain paragraphs of his Section 2255 petition as "scurrilous", the motion had been "pre-judged". This Court held: "There is no basis in logic or law for such conclusion, nor is there any error in the court's ruling".

Finally, Appellant urges that Judge Foley's subsequent disqualification upon the filing of an affidavit pursuant to Title 28, United States Code, Section 144 is "final and absolute proof" of his bias and prejudice [Appellant's Opening Brief, p. 17]. It is unnecessary to look beyond Section 144 itself to deal with this argument. The statute provides that once an affidavit of bias or prejudice is filed, "such judge shall proceed no further therein". Although the challenged judge can pass on the sufficiency of the allegations, he must accept the facts alleged as true. Berger v. United States, 255 U.S. 22 (1921); Willenbring v. United States, 306 F.2d 944 (9th Cir. 1962). Thus, Judge Foley's disqualification is not an admission that he was biased or prejudiced against the Appellant during the hearing.

VI

CONCLUSION

A review of the record revealing more than sufficient evidence to sustain the findings of fact by the trial judge below, and no prejudicial misconduct by the trial judge appearing from the record, the appellee respectfully prays that the judgment of the court below be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

DAVID R. NISSEN,
Assistant U. S. Attorney,
Chief, Special Prosecutions
Division,

GERALD F. UELMEN,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gerald F. Uelmen
GERALD F. UELMEN

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